

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

STUDENTS FOR FAIR ADMISSIONS, *
INC., *

Plaintiff, *

vs. *

UNIVERSITY OF NORTH CAROLINA, *
et al., *

Defendants. *

Case No. 1:14CV954

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TRANSCRIPT OF TRIAL CLOSING ARGUMENTS
BEFORE THE HONORABLE LORETTA C. BIGGS
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

(All parties present.)

THE COURT: All right. It appears that we're at the conclusion of the trial. We're about to hear closing arguments.

Are there issues that we need to address before we hear closing arguments?

MR. FITZGERALD: No, Your Honor.

THE COURT: I'm sorry. Go ahead.

MR. FITZGERALD: No, I was saying no, Your Honor.

THE COURT: Oh. Thank you.

My deputy clerk is going to time you. For Plaintiff and Defendant, it will be no more than one-and-a-half hours. You can certainly do less. And then the Intervenorors have asked for 20 minutes. She will give you each a two-minute warning.

So with that said, I would call on Students for Fair Admissions for their closing.

MR. STRAWBRIDGE: Thank you very much, Your Honor.

THE COURT: Yes.

MR. STRAWBRIDGE: May it please the Court, I'm just going to begin briefly by expressing thank you on behalf of Students for Fair Admissions to the Court and to the staff that has helped make the trial possible. These are, obviously, very challenging times, but we've been treated so well, not only by the Court and your clerks, but also by Ms. Blay and Ms. Russell

1 and Mr. Renteria and all the Court Security Officers. We truly
2 appreciate everyone's efforts to make this process work so that
3 this important case can proceed.

4 And although we, obviously, disagree with opposing counsel
5 on the merits of the case, I, again, do want to put on the
6 record our sincere appreciation to them for their cooperation.
7 This is the model under which practitioners on opposite sides
8 of cases should proceed, and I really do mean that. I thank
9 them for their cooperation.

10 With that said, we're ready to turn to the issues of this
11 case.

12 **THE COURT:** Yes, sir.

13 **MR. STRAWBRIDGE:** Those issues are fundamental. They
14 go to the most important promises of our constitution; that the
15 government may not make decisions on the basis of race, except
16 in the most pressing of circumstances.

17 For purposes of this trial, it is assumed that UNC has a
18 recognized interest in obtaining the educational benefits of
19 diversity, including racial diversity, on campus. UNC would
20 like that to be the end of its case. That's why they have
21 spent so much time emphasizing those benefits. But it's really
22 merely the starting point. Because UNC seeks to take race
23 independent of any other factor into account at all stages of
24 its admissions process, it is subject to a standard that the
25 Supreme Court has set out.

1 As Your Honor knows, that standard is strict scrutiny.
2 Racial classifications have to be judged so that they are
3 narrowly tailored to further compelling governmental interest.
4 The university bears the ultimate burden of demonstrating,
5 before turning to racial classifications, that available,
6 workable, race-neutral alternatives do not suffice. That's the
7 standard set forth by *Grutter* and *Fisher*. We'll talk a little
8 bit more about that as we go through the closing argument.

9 There are three questions that we talked about in the
10 opening of the trial and that are the focus of our closing
11 today. UNC has failed to define and measure critical mass in a
12 way that ensures that its goal of advancing its interests in
13 the educational efforts of diversity has a definite and
14 measurable ending point. We also -- the evidence has shown
15 that UNC's review is formulaic; race frequently is the defining
16 feature in its admissions decisions; and UNC has failed to give
17 serious, good-faith consideration to race-neutral alternatives.

18 I'm just going to pause for a second and say the one thing
19 you did not hear from me in opening and you will not hear from
20 me in close is that somehow this case comes down to an
21 allegation of cheating at the school group review process.
22 Mr. Fitzgerald liked to focus on that in his opening, and he's
23 raised it occasionally throughout the trial. And I suppose
24 it's understandable that he wants to focus on a claim that was
25 not developed for trial and avoid discussion of the claims for

1 which the evidence at trial has decidedly weighed against his
2 clients' case.

3 Moving to the first question as to critical mass -- and I
4 will just tell Your Honor, we have decided to divide this up.
5 I am going to handle the first question. Mr. McCarthy is going
6 to handle the second question. Then I will return to briefly
7 do the third question and wrap up.

8 The standard for critical mass, which is the only interest
9 the Supreme Court has ever upheld as the goal to achieve the
10 educational benefits of diversity, it was the interest that was
11 asserted by the University of Michigan in *Grutter*; it was the
12 interest that was asserted by the University of Texas in
13 *Fisher*; and that interest is very specific.

14 As the Court said in *Fisher*, you can't assert an interest
15 in the educational benefits of diversity writ large. You have
16 to have a goal that is not amorphous, that is sufficiently
17 measurable, that permits judicial scrutiny; and it has to be a
18 concrete and precise goal, so you know when you have reached
19 it, it is no longer necessary to use race. That's the standard
20 set forth in *Fisher*.

21 The evidence in this case -- as you know, the university
22 has asserted that it is aiming to enroll critical masses of
23 students, particularly from groups of -- members of groups the
24 university deems underrepresented, in order to obtain the
25 benefits of racial diversity.

1 But UNC has not been able to show any evidence in the 17
2 years since *Grutter* was decided, or even in the more -- last
3 eight years since *Fisher I* was decided, as to how they define
4 critical mass, what that goal is, how is it quantifiable in any
5 way, and how will they know when they get there. This is a
6 question that has been on the minds of people at the University
7 of North Carolina. They've known this is a question they need
8 to ask and they need to answer.

9 You can see that here. This is an e-mail from 2013.
10 Ms. Polk, the second in command in the admissions office, wants
11 to know: "How do we define critical mass? Are we attempting
12 to achieve critical mass on a university-wide level, in the
13 residence halls, in the individual classrooms, or all the
14 above? How will we know that critical mass has been achieved,
15 and can we terminate race-conscious admission practices? If
16 not now, when?" Those are the questions that are required by
17 the Supreme Court they answer.

18 But the evidence shows -- we presented some of it at trial,
19 and some of it is in the record through admitted exhibits or
20 through deposition designations -- that there is no definition
21 of critical mass.

22 This is Mr. Farmer's testimony at trial: "You cannot point
23 to any document in the UNC admissions office that attempts to
24 define critical mass, can you?

25 "Answer: I cannot."

1 We had testimony from Taffye Benson Clayton who
2 specifically said -- and this is a very keyword -- "Because
3 critical mass is amorphous, there is really no way to make the
4 determination."

5 Amorphous is the exact word the Supreme Court said cannot
6 be the nature of the goal. It cannot be an amorphous goal.

7 The same thing with Ms. Polk. This is her designated
8 deposition testimony. "There's no concrete definition.
9 There's nothing that says when you get to X, you will have
10 reached critical mass."

11 This goes on and on throughout the admissions office and
12 the university as a whole. The chancellor of the university:
13 "I don't find that term very useful because I don't know what
14 that means."

15 Michael Davis, his trial testimony here:

16 "You've heard the term 'critical mass,' but you're not
17 really familiar with what it means, correct?

18 "That is correct."

19 The deposition testimony of Yolanda Coleman:

20 "Are you familiar with this term 'critical mass'?"

21 "Answer: No.

22 "No? Is that a term that was used in the admissions
23 office?

24 "Answer: No, not that I recall."

25 Dr. Kretchmar, who testified here, said it was fair to say

1 that during her time in the admissions office she had not had a
2 discussion specifically about how the university is using race
3 to achieve critical mass.

4 Now, obviously, having the goal is important, but equally
5 important is that it be measurable; that we know when we're
6 making progress toward the goal. One, that we know why it is
7 necessary to use race and, two, when can we stop using race.
8 And when we turn to the measurement side, the evidence has
9 shown that UNC for, you know, going on nearly two decades from
10 *Grutter* has not had any way to measure critical mass.

11 This is Mr. Farmer. As of 2017 -- strike that. I'm sorry.
12 As of 2017, the only formal attempts by UNC to determine if it
13 had obtained critical mass were some climate surveys of the
14 student body, but he admitted that he had not looked at any
15 such climate surveys since 2006. That was more than 10 years
16 ago at the time he gave his testimony in his deposition, and
17 it's been even longer now.

18 And Lynn Williford's deposition -- designated deposition
19 testimony -- she's the person in charge of institutional
20 research, including the climate surveys -- testified that she
21 had never been asked to measure the extent to which any group
22 on campus had obtained critical mass, and she had never been
23 asked to measure or quantify critical mass for any group on
24 campus. That was her testimony.

25 Mr. Rosenberg here at trial had no understanding about how

1 to determine whether UNC has reached critical mass.

2 The list goes on and on here. This is a real problem for
3 UNC, especially given the strict scrutiny burden here.

4 Now, we did hear some testimony from Mr. Farmer about some
5 reports done, and one example was DX3. This is their report on
6 the educational benefits of diversity and inclusion, but you
7 may remember that we asked Mr. Farmer if that report actually
8 contained any definition, quantification, even a range or any
9 sort of measurable effect of critical mass, and he could not
10 point to one. It's merely a 16-page, give or take, report that
11 just talks about the interests that the university has in
12 achieving the educational benefits of diversity. But that is
13 not sufficient. The Supreme Court told us that in *Fisher*.
14 Asserting an interest in the educational benefits of diversity
15 writ large is insufficient. That's exactly what this was.

16 I asked Mr. Farmer about this report. The testimony in the
17 record is that he worked on redrafting this report in one
18 weekend. Obviously, this report arose several years after the
19 lawsuit was filed, and it deserves at least some measure of
20 skepticism then, but even on its own terms, it doesn't actually
21 achieve any definition of critical mass. It doesn't define
22 critical mass, and so it is not sufficient.

23 And if there were any question about this, the report was
24 given to Mr. Farmer to revise by his boss at the time, who was
25 the executive vice chancellor and provost, James Dean; and

1 James Dean's testimony on this point is both decisive and
2 designating because when he was asked whether this report had
3 any connection to what the university -- I'm sorry -- the term
4 "critical mass" had any connection to what the university was
5 trying to achieve with its use of race, he testified that in
6 all his conversations with Steve Farmer, that phrase had never
7 come up. Neither -- "No one has directed anybody to achieve a
8 critical mass, and I'm not even sure we would know what it is."

9 Why does this matter? It matters because if you don't know
10 what the critical mass that you're attempting to achieve is,
11 you're never going to know when you get there. And the Supreme
12 Court has been clear about this, again, going all the way back
13 to 2003: Race-conscious admissions policies must be limited in
14 time. This requirement reflects that racial classifications,
15 however compelling their goals, are potentially so dangerous
16 that they may be employed no more broadly than the interest
17 demands. They need to have a logical end point.

18 Those are the words of the Supreme Court, and without a
19 definition of critical mass or a way to measure it or any kind
20 of parameters by which one might understand what are we trying
21 to do and when will we know that we've gotten there, it doesn't
22 have a logical end point.

23 This was driven home very clearly by the testimony we heard
24 at trial. We'll start with what Mr. Farmer said when asked
25 what critical mass was. This is the closest I think the Court

1 came to hearing a definition of critical mass at any point in
2 the trial testimony. It "is a complicated idea, a complex
3 idea. It's really about the experience of students in our
4 community, and it's about their ability to contribute fully to
5 the experience of others and also benefit fully from the
6 experience that we offer."

7 "That is a nice sentiment, but it is not measurable. There
8 is no 'there' there. It has no tangible basis from which one
9 can derive some sort of concrete understanding of what exactly
10 are we trying to do and when will we know we're there so we can
11 stop using race."

12 And the final punctuation on this point I think came from
13 Ms. Panter, her testimony. She's heading up the group, again,
14 formed long after this litigation began, to actually examine
15 race-neutral alternatives, allegedly in good faith. But
16 Ms. Panter's testimony was that she could not even say if the
17 four racial groups that UNC -- that we've discussed were
18 equally represented on campus, if there were the same
19 percentage of white students, Asian students, African American
20 students, and Hispanic students, even then she would not be
21 able to say if the university was sufficiently racially diverse
22 at that point. She doesn't even know if that would constitute
23 critical mass.

24 That's disturbing. That's inconsistent with what the
25 Supreme Court required, and I think it underscores UNC does not

1 have any kind of measuring stick or process or concrete
2 nonelusory goal that would allow them to know when they have
3 achieved critical mass and can stop using race. That in and of
4 itself should be sufficient for them to fail strict scrutiny.

5 I'll now let Mr. McCarthy address the second question.

6 **THE COURT:** Thank you.

7 **MR. MCCARTHY:** Thank you, Your Honor.

8 And before I address this question, I would like to
9 reiterate Mr. Strawbridge's comments about the appreciation for
10 the Court's time and effort and that of the court staff as
11 well. We appreciate the hospitality. It's been a Herculean
12 effort, I think, by everybody to make this thing go properly.
13 We do appreciate it very much.

14 In terms of UNC's use of race in admissions, there's an
15 important standard that comes down to two parts. It must be
16 truly -- "truly individualized consideration demands that race
17 be used in a flexible, nonmechanical way"; and, distinctly, "a
18 university's admissions program must remain flexible enough to
19 ensure that each applicant is evaluated as an individual and
20 not in a way that makes an applicant's race or ethnicity the
21 defining feature of his or her application."

22 What we'll see here with these two distinct requirements:
23 The statistical and nonstatistical evidence in this case will
24 show, one, that UNC's admissions process is formulaic and
25 mechanical; and, two, that race is a dominant factor in UNC

1 admissions.

2 SFFA's statistical case in this case comes by way of
3 Professor Peter Arcidiacono, professor of economics at Duke
4 University. Among other recognition in his field, Professor
5 Arcidiacono is a Fellow of the Econometric Society and a Fellow
6 of the International Association of Applied Econometrics. In
7 the *Harvard* case, a well-known affirmative action case that has
8 run parallel to this one at times, Judge Allison Burroughs
9 described Professor Arcidiacono as highly respected and
10 well-qualified.

11 Drawing on his vast experience and expertise in the area of
12 discrete choice modeling, Professor Arcidiacono estimated a
13 logit model, the output of which yields a formula that
14 approximates UNC's admissions process. Using the iterative
15 process commonly employed in this field, Professor Arcidiacono
16 made seven versions of his model. His updated Model 4, he
17 testified, is his preferred model. Notable, that model
18 includes the five ratings assigned by UNC's application
19 readers.

20 Deposition testimony in this case designated for trial here
21 shows that UNC's own data analytic subcommittee found that
22 including those five UNC ratings is important to modeling their
23 admissions process.

24 Professor Arcidiacono's statistical analysis shows that
25 UNC's admissions process is highly formulaic. As Professor

1 Arcidiacono explained, his preferred model is highly accurate.
2 It accurately predicts admissions decisions over 92 percent of
3 the time for in-state applicants. Similarly, his preferred
4 model is highly accurate with respect to out-of-state
5 applicants. There it accurately predicts admissions decisions
6 more than 93 percent of the time.

7 Professor Arcidiacono helped illustrate how formulaic UNC's
8 admissions decisions are through his graphical representations.
9 This slide, for example, shows that his model easily divides
10 nearly all in-state applicants into near-certain rejects.
11 That's on the left side of the picture where the graph spikes
12 near the 0 percent chance of admission and divides on the other
13 side applicants into near-certain admits. That's on the right
14 side of the graph where it spikes near 100 percent admission.

15 Further, he showed that the accuracy -- the accuracy of
16 that same model. His modeling not only divides the in-state
17 applicants into near-certain rejects and near-certain admits,
18 but it does so with extraordinary accuracy. Professor
19 Arcidiacono testified that his models have incredibly high
20 accuracy, much higher than what is normally seen in his field,
21 and that led him to opine that UNC's process is highly
22 formulaic and guided by an implicit formula.

23 You're likely to hear UNC claim that its process cannot be
24 reduced to an implicit formula and that its process is neither
25 mechanical nor formulaic. UNC, in fact, claims that it

1 conducts individualized assessments of over 40,000 applicants
2 each cycle. But the nonstatistical evidence in this case shows
3 that this process is highly mechanical, and it confirms
4 Professor Arcidiacono's conclusion that the process is highly
5 formulaic.

6 Jared Rosenberg, UNC's associate director of undergraduate
7 admissions, supervises the day-to-day work of the admissions
8 office. He testified that UNC readers complete review of five
9 applications an hour, or one every 12 minutes. Again, the
10 record shows that these applications average over 30 pages in
11 length. In fact, the evidence shows that readers need only 10
12 minutes to review one of these 30-plus-page applications.

13 Mr. Rosenberg further testified that it was his job to keep
14 the trains running on time, to keep the machine running
15 smoothly, and he made clear that he manages UNC's readers to
16 ensure that they would read the same files in the same way and
17 score them in the same manner. He emphasized that each
18 reader's decisions are calibrated to fit the admissions
19 office's priorities.

20 As Mr. Rosenberg's testimony before this Court shows, this
21 calibration process ensures that 99 percent of the time a
22 second reader does not need to change the first reader's
23 decision. And other evidence shows that readers know that
24 they're being calibrated, and they seek confirmation that they
25 are getting the right answers when they review application

1 files.

2 It should not be surprising, then, that UNC boils down
3 applicants to a few key measures in race and ethnicity. There
4 are numerous examples in the record of UNC readers being keenly
5 focused on race and ethnicity when reviewing application files.
6 Not surprisingly then, the nonstatistical evidence illustrates
7 how race dominates the process. UNC's reading document --
8 UNC's reading document makes clear that race, ethnicity, or
9 national origin may be used at any stage of the process.

10 The record evidence shows that race, in fact, pervades the
11 entire process, starting with recruiting. Race is a point of
12 focus in recruiting. UNC purchases data from the College Bound
13 that is tiered by race. These tiers show very large
14 disparities between what UNC views as admissible applicants as
15 between URM and non-URM applicants.

16 Furthermore, race pervades the process in terms of the
17 application review. Readers focus on race throughout the file
18 reading, repeatedly highlighting the race of applicants as they
19 push through files. For example, a reader here states that she
20 is going through this trouble of finding a way to admit an
21 applicant who happens to be a biracial male.

22 Race further pervades the process in other ways. Before
23 UNC stopped the weekly circulation of core reports, the
24 admissions office used them to apprise admission office leaders
25 of a few key demographic benchmarks, among them race. Race was

1 prominently reported on core reports, showing whether or not
2 UNC was ahead of the previous year's racial and ethnic numbers.

3 And although SFFA is not pressing a specific claim as to
4 the SGR process, UNC was keenly focused on race there as well.
5 The second readers regularly referenced race in making SGR
6 decisions.

7 All of this nonstatistical evidence demonstrates that race
8 pervades UNC's admissions process. UNC was certainly aware of
9 its keen focus on race, but did they ever do anything to
10 inquire or investigate the effect race was having on their
11 process? Here's what they had to say. Stephen Farmer
12 testified on multiple occasions he directed Jennifer Kretchmar
13 to investigate whether and how other factors might have been
14 affecting UNC's admissions process. He specifically asked her
15 to develop formulas to model the probability of admission to
16 determine whether UNC was affording in-state applicants legacy
17 preferences and to determine the effect gender has on the
18 admissions process.

19 But despite having ample reason to question the effect race
20 has in UNC's admissions process, Mr. Farmer never asked
21 Dr. Kretchmar to employ a similar analysis to determine the
22 extent to which race affects UNC's admissions decisions and
23 admissions process, not once in his nearly two decades.

24 Professor Arcidiacono took on the question UNC never
25 bothered to ask and modeled UNC's admissions process to

1 determine the effect race has in the process. His statistical
2 analysis demonstrates that race is, in fact, a dominant factor
3 in admissions. Professor Arcidiacono conducted four separate
4 and distinct analyses to quantify the effect of race in UNC's
5 admissions decisions. Each shows the same thing: Race is a
6 dominant factor. It is determinative for many URM applicants.

7 First, Professor Arcidiacono conducted a transformational
8 analysis where he turned off the effect of racial preferences
9 in his model and showed how it would affect the probability of
10 admission for in-state URM applicants, and that analysis showed
11 that race has a massive effect on URM admissions. For example,
12 as this slide shows, a white male, non-FGC applicant with a
13 25 percent chance of admission, if treated as an African
14 American applicant, would have more than a 92 percent chance of
15 admission. Professor Arcidiacono did the same analysis out of
16 state, and the results there were even more striking. For a
17 white male, non-FGC applicant with a 25 percent chance of
18 admission, if he were treated as an African American applicant,
19 he would have more than a 99 percent chance of admission.

20 And you may hear UNC claim that this analysis is skewed
21 because it focuses on nonrepresentative applicants, but an
22 applicant with a 25 percent chance of admission actually
23 reflects the overall chance of admission to UNC, which is
24 undisputably a little over 25 percent.

25 You may also hear UNC claim that Professor Arcidiacono

1 focuses improperly on deciles that are on the bubble, so to
2 speak. But the deciles on the bubble are the ones most likely
3 to be the place where racial preferences will matter, and the
4 data show that those deciles are the ones where most URM
5 applicants are actually admitted.

6 Professor Arcidiacono also conducted an average marginal
7 effect analysis. It involves removing the effect of racial
8 preferences and observing the changes in the probability of
9 admission across all applicants and then averaging that change
10 in probability across all applicants of each racial group. For
11 in-state African American applicants, their average probability
12 of admission drops from 30.5 percent to 17.8 percent without
13 racial preferences, and for out of state, it drops from
14 17.1 percent with racial preferences to only 1.5 percent
15 without racial preferences.

16 This type of analysis that Professor Arcidiacono employed
17 is supported in the academic literature. Indeed, Professor
18 Arcidiacono was invited to author a survey paper in the *Annual*
19 *Review of Economics*, a journal for which Dr. Caroline Hoxby was
20 an editor at the time. Professor Arcidiacono's survey covered
21 over 70 academic papers involving economic analysis of
22 affirmative action in higher education, and it employed average
23 marginal effect analysis.

24 This analysis is further supported by competing expert work
25 in related litigation. Harvard retained Professor David Card,

1 a John Bates Clark Medal award winner for his work in
2 economics, and Professor Card employed average marginal effect
3 analysis in defending Harvard, and that average marginal effect
4 analysis was discussed extensively in the decision in that
5 case. Dr. Hoxby, on the other hand, calculated the median
6 instead of the average marginal effect, but she could not
7 support any -- she could not cite any support for her novel
8 median marginal effect analysis anywhere in the academic
9 literature.

10 Professor Hoxby's critique of Professor Arcidiacono's
11 average marginal effect analysis inadvertently shows massive
12 effect on race -- or massive effect of race on admissions
13 decisions. For example, she showed that turning off racial
14 preferences has a larger effect on the admission for African
15 American applicants than switching their GPAs to straight Bs.

16 Next, Professor Arcidiacono showed the effect of racial
17 preferences on URM applicants who were actually admitted to
18 UNC. This analysis similarly showed the massive effects of
19 UNC's racial preferences. For example, out-of-state URM
20 applicants who were actually admitted to UNC would become very
21 likely rejections if racial preferences were turned off.
22 Importantly, Dr. Hoxby never mentioned this analysis in her
23 testimony, not once.

24 Professor Arcidiacono also conducted an analysis involving
25 capacity constraints whereby he could see the effect of race on

1 the entire class as a whole, and that analysis showed over six
2 years that turning off the effect of racial preferences at UNC
3 would change thousands of admissions decisions over that time.
4 Dr. Hoxby says little, if anything, about Professor
5 Arcidiacono's capacity constraints analysis. Undoubtedly, this
6 is for two reasons. Number one, Dr. Hoxby employed no capacity
7 constraint analysis of her own, and number two, Professor
8 Arcidiacono's capacity constraints analysis is designed to and,
9 in fact, perfectly matches the number of admits each year that
10 UNC actually has.

11 Dr. Hoxby did her own posit analysis, and that analysis
12 does nothing to undermine Professor Arcidiacono's conclusions
13 here. Dr. Hoxby's analysis focuses almost entirely on her
14 Shapley decomposition analysis of the pseudo R-squared metric
15 for her models. This slide here that she focused on quite a
16 bit in her testimony is based off of her opening report
17 Exhibit 1, Table 1.

18 The problem with Dr. Hoxby's analysis is that it is
19 unsupported by academic literature in the field. Dr. Hoxby's
20 position is that the pseudo R-squared represents the percent of
21 the admissions decision explained by the model, but textbook
22 economic -- textbook econometrics demonstrates this is wrong.

23 First, Professor McFadden himself. The pseudo R-squared
24 that Dr. Hoxby employs is McFadden's pseudo R-squared, and
25 Professor McFadden himself explains that his pseudo R-squared

1 gives values that tend to be considerably lower than those of
2 the R-squared.

3 Professor Train in his textbook explains that the pseudo
4 R-squared is not at all similar to the R-squared used in
5 regression. In fact, he says it has no intuitively
6 interpretable meaning.

7 Professor William Greene says, similarly, pseudo R-squared
8 has no connection to the fit of the model to the data. He even
9 gives an example with a pseudo R-squared of .083 that predicts
10 accurately more than 71 percent of the time. Yet Dr. Hoxby
11 persists in saying that a pseudo R-squared of .248 predicts
12 only 42.8 percent of the admissions decisions. Just as
13 Professor Greene explained, Professor Arcidiacono showed that
14 Dr. Hoxby's model is very accurate.

15 Not only is Dr. Hoxby's use of the pseudo R-squared
16 unsupported in the academic literature, but her Shapley
17 decomposition analysis is unsupported in the field. She could
18 identify no academic paper in which an economist used it in the
19 same manner she did here. And she conceded that the Shapley
20 decomposition analysis she employed would show a much smaller
21 effect if focused only on the affected racial group.

22 Dr. Hoxby purported to show that removing racial
23 preferences would only have a small effect on admissions
24 decisions because it would reduce Professor Arcidiacono's model
25 accuracy by only a small margin. But the data underneath

1 Dr. Hoxby's analysis shows the opposite. What it shows, in
2 fact -- I'm sorry. My eyes are not good enough to be able to
3 read those numbers closely. I'm going to flip to the slide.

4 Thank you.

5 In fact, those numbers showed that removing race causes the
6 accuracy of the model's ability to predict admission for
7 African American applicants in state to drop from over
8 86 percent to down around 65 or 66 percent, and out of state it
9 drops the accuracy of the model's ability to predict admission
10 for African American applicants from nearly 75 percent to less
11 than 18 percent.

12 Now, there was some discussion about overfitting here
13 during the trial. Professor Arcidiacono used a textbook graph
14 illustrating the concept of overfit, and that concept is about
15 out-of-sample error, in particular, minimizing out-of-sample
16 error. Professor Hoxby's overfit methodology, on the other
17 hand, was flawed in several respects. Those errors in her
18 methodology caused overstatements of overfitting or it causes
19 it to report overfitting where there actually is none.

20 Indeed, as Professor Arcidiacono demonstrated, Dr. Hoxby's
21 shifting metrics for overfit actually defeat themselves by
22 suggesting that her least accurate models are actually the most
23 accurate.

24 In the end, when resolving competing expert analysis in
25 this case, it is worth emphasis that Professor Arcidiacono's

1 analysis is supported by numerous econometrics textbooks and
2 peer-reviewed academic work; among those, Professor Train's
3 textbook, Professor Greene's textbook --

4 **MR. FITZGERALD:** Your Honor -- I'm sorry -- I hate to
5 object during a closing, but these text are not in evidence.
6 They were shown to the witness, but they've never been offered
7 as exhibits. So I object to repeated references to exhibits
8 not in evidence.

9 **MR. MCCARTHY:** They were cited by Dr. Hoxby in her
10 report and Professor Arcidiacono in his report. The one, in
11 fact, on the screen was cited by Dr. Hoxby in her report, as
12 she acknowledged at trial, and she was familiar with the others
13 because they were cited by Professor Arcidiacono at trial, and
14 actually, she quoted some of the language --

15 **THE COURT:** But whether or not they support your
16 expert's opinion is not really before the Court.

17 **MR. MCCARTHY:** I'm sorry?

18 **THE COURT:** Whether or not they support the opinion of
19 your expert is not before the Court, and you're telling me that
20 it is, correct?

21 **MR. MCCARTHY:** Your Honor, I'm not telling you that
22 specific issue is before the Court. All I'm saying is that
23 these were the text that were cited by the experts in their
24 competing analysis, so it's relevant to how they conducted --

25 **THE COURT:** All right. I can hear that they may have

1 been cited by someone in their analysis, which is different
2 from them supporting the expert's opinion.

3 **MR. MCCARTHY:** Okay, Your Honor. Understood.

4 **THE COURT:** All right. So limit it to that, please.

5 **MR. MCCARTHY:** Understood. We can move on.

6 Dr. Hoxby, on the other hand, repeatedly failed to identify
7 any academic work supporting her novel analysis: Not her
8 Shapley decomposition analysis, not her novel McFadden pseudo
9 R-squared analysis, and not her novel median marginal effect
10 analysis.

11 **MR. STRAWBRIDGE:** So, your Honor, that brings us to
12 the third and final aspect of the questions for trial and the
13 evidence that was presented here. It has to do with the
14 evidence that goes to whether or not there are workable
15 race-neutral alternatives available to the University of
16 North Carolina in its admissions process. And relevant
17 language from *Fisher* is here on the screen: "The reviewing
18 court must ultimately be satisfied that no workable
19 race-neutral alternatives would produce the educational
20 benefits of diversity. If 'a nonracial approach...could
21 promote the substantial interest about as well and at tolerable
22 administrative expense,' then the university may not consider
23 race."

24 Before we get to what the evidence in this case showed
25 about the availability of workable race-neutral alternatives,

1 it bears a brief review of the record of UNC's consideration of
2 race-neutral alternatives since 2003, in the 17 years since the
3 Supreme Court first laid down this approach in *Grutter*.

4 The only evidence that we have with respect to UNC's first
5 attempt to analyze an actual race-neutral alternative is this
6 spreadsheet that Mr. Farmer apparently used at his desk, but as
7 you heard his testimony at trial, he's able to tell us very
8 little about that. He could not replicate that study today.
9 He -- with respect to the completion of that study, he didn't
10 recall discussing it with anybody in the admissions office
11 specifically, sharing it with the faculty undergraduate
12 commission, nor was it boiled down to a written report or a
13 written analysis. So I think right there that falls well short
14 of the -- of the serious and good-faith consideration of
15 race-neutral alternatives that are required.

16 There was a literature review a couple of years later that
17 was simply just a survey of what was happening in other
18 schools. It was actually not an attempt to analyze what would
19 happen at the University of North Carolina, so that can't
20 constitute a serious, good-faith consideration.

21 Then we have the analysis that was done for the amicus
22 brief, and I would submit that an analysis that was done after
23 the university had already decided to submit an amicus brief in
24 the pending *Fisher* litigation is not the kind of serious,
25 good-faith consideration that the Supreme Court had in mind.

1 The timeline with respect to the submission of the amicus brief
2 demonstrates that it was done as part of that effort. I think
3 Mr. Farmer said he asked it be prepared in conjunction with
4 conversations he was having with people at UNC's law school who
5 were authoring that amicus brief. By their own admission -- by
6 Dr. Kretchmar's own admission here in this particular document
7 that's on the screen, it was an unsophisticated analysis.

8 The next time that there was an effort to actually analyze
9 race-neutral alternatives came several years later and long
10 after the deadline that OCR had requested for a full review of
11 the university policies that passed. In the fall of 2014,
12 there was a request -- or there was a working group assembled.

13 And the flaws of this are substantial, and I will not
14 recount all the evidence at trial. I will just note that at
15 the outset the charge that was given to the members of that
16 working group was to determine whether each alternative would
17 yield an entering class with equal or greater diversity,
18 academic quality, and extracurricular achievement and
19 potential. We know that's inconsistent with the Supreme
20 Court's standard which only requires that it work about as
21 well. We cannot set a floor of our existing levels of any of
22 those criteria or else it essentially becomes a de facto quota.
23 That was the charge that they were given, and that was the very
24 specific standard upon which the various alternatives -- that
25 this report eventually discussed or analyzed.

1 Moreover, as we know, as part of preparing that report,
2 this working group never identified just how much of an effect
3 race was having in their admissions process today, nor did they
4 generate any kind of definition of critical mass or some sort
5 of goal for what they actually sought to achieve through the
6 ruse of race, which is a necessary step to analyzing whether a
7 race-neutral alternative would achieve that goal about as well.

8 What was the substance of this report? Well, Dr. Kretchmar
9 eventually prepared a draft October 31, 2014. She sent this
10 draft around to Barbara Polk and, in her own description, "I
11 know most of this won't likely make the cut for the final
12 draft, but I felt like I needed to at least make an attempt.
13 So it's a start, at least." Now, that document that she sent
14 to Barbara Polk was not the start of this working group's
15 report. It was the end of the working group's report. No
16 substantive changes were made to that report for nearly two
17 years, at which point the undergraduate admissions committee
18 accepted to -- I'm sorry. The Advisory Committee on
19 Undergraduate Admissions accepted that report basically in
20 full, without making any substantive changes whatsoever. That
21 is conceded in interrogatory responses that are in evidence in
22 this case. And notwithstanding the fact that it was a first
23 effort and a draft that Dr. Kretchmar herself did not think
24 would make the final cut, the Advisory Committee on
25 Undergraduate Admissions characterized it as the best efforts

1 of the first group charged specifically with exploring
2 race-neutral alternatives.

3 At that point, of course, the Committee on Race-Neutral
4 Alternatives chaired by Dr. Panter was established. That
5 committee, having been established in 2016, has produced some
6 preliminary reports. It has apparently conducted some
7 preliminary analysis, still has yet to provide any definition
8 of critical mass. There is no actual findings of that
9 committee with respect to the availability of race-neutral
10 alternatives or any analysis as to what a race-neutral
11 alternative would be deemed successful. None of that is before
12 the Court. It's a -- that process is just getting off the
13 ground, despite having been underway for a number of years at
14 this point. I think that that -- that underscores the lack of
15 a serious attempt to search for a race-neutral alternative.

16 Now, we did hear evidence in this case that there are
17 workable race-neutral alternatives available to UNC, and the
18 primary evidence presented by the Plaintiff was the simulations
19 prepared by Mr. Kahlenberg, who has dedicated his career to
20 writing about issues of race and class in schools, including
21 colleges, and studying the field of race-neutral alternatives.
22 He presented this Court with a number of simulations. We're
23 going to go through them quickly, but I think Your Honor is
24 familiar with the basic idea of these simulations.

25 The most important note, I think, at the outset here is the

1 variety of different simulations that were run. There were
2 simulations that were run that assumed, essentially, that UNC
3 kept its current admissions process, including its holistic
4 consideration, its ratings, its analysis of the candidates as
5 they do now, simply assuming that they got rid of any racial
6 preferences, as well as some other preferences they have for
7 legacy students and the such.

8 And we have three different examples of those. We also
9 have a percentage plan race-neutral alternative that was
10 presented. We have a hybrid plan that includes parts of a
11 percentage plan and parts of a holistic race-neutral
12 alternative, and we even have a plan that is based on
13 Ms. Hoxby's methodology. And I think as we go through this,
14 what I want Your Honor to understand or at least what I would
15 like to emphasize is the fact that these simulations cover the
16 gamut. Some of them include out-of-state students; some of
17 them are focused on in-state students; some of them include the
18 existing applicant pool, assuming nobody else applies to UNC;
19 some of them include a much broader applicant pool, assuming
20 that most of the in-state students, if not all in-state
21 students, in North Carolina apply to UNC. It even uses
22 Professor Hoxby's methodology, which was to assume that
23 75 percent of the students in North Carolina would apply to
24 UNC.

25 So Mr. Kahlenberg's simulations have covered the waterfront

1 of different approaches. I mean, I don't think they could be
2 fairly criticized on the ground that they focus only on one
3 particular set of assumptions or another.

4 What were those simulations? Your Honor remembers them. I
5 will not belabor the point. Simulation 3 is the first one that
6 was presented. This one includes in-state and out-of-state
7 applicants. It -- as you can see, the results here do very
8 well with respect to the existing levels of racial diversity,
9 assuming that is UNC's unstated goal. They actually increase
10 socioeconomic diversity, which UNC at least claims is just as
11 big of a priority with respect to the educational benefits of
12 diversity as racial diversity, and they do very well with
13 respect to the academic characteristics. We're within one
14 percentile of the average SAT score, and we're very close to
15 the high school GPA.

16 And as we go through all these simulations, it's worth
17 remembering the second point that Mr. Kahlenberg made, which is
18 that when you are increasing the number of students who have
19 come from challenging socioeconomic circumstances, whether
20 that's a disadvantaged family situation, a disadvantaged school
21 or a disadvantaged neighborhood, the academic credentials of
22 those students have to be viewed in context, and, indeed, it is
23 more impressive that those students are able to obtain the same
24 types of academic achievements, and in particular their GPA,
25 than a student who goes -- or lives in a more advantaged area.

1 And so viewed in that context, the academic characteristics of
2 the classes in this simulation are very favorable.

3 The next simulation that was presented here, this is
4 Simulation 11. This is providing a socioeconomic status
5 benefit or additional preference for socioeconomic status, and
6 you can see in this case you have a large uptick, not only in
7 the diversity among the underrepresented groups but in
8 socioeconomic diversity. And, again, the academic credentials
9 are very good.

10 We have the next simulation, which is Simulation 8. This
11 is a version of a top 4.5 percent plan. It draws upon mainly
12 the existing applicant pool. Again, you can see that the
13 underrepresented groups are represented just as well in this
14 simulation as they are under the status quo, socioeconomic
15 diversity increases, the academic characteristics remain highly
16 competitive.

17 The same is true with respect to this simulation. This was
18 a hybrid. You had top 4 percent based on a class rank
19 race-neutral admissions policy. Again, general increase at
20 least with respect to disadvantaged schools; at least a
21 maintenance, if not a different improvement -- this is the
22 slide that does not include Native Americans broken down, which
23 is why the underrepresented minorities report is a little bit
24 smaller than it is in the others, but it certainly works about
25 as well. And, again, the academic credentials remaining very,

1 very competitive.

2 And then we have the example that was taken from Dr. Hoxby.
3 We are using here her own methodology of finding applicants and
4 setting aside seats. There can be no concern here that somehow
5 Mr. Kahlenberg's assumptions were different than Professor
6 Hoxby's, and still we're yielding an improvement in
7 socioeconomic diversity; an actual improvement, I think, in the
8 GPA; competitive test scores and very good representation
9 across all the racial groups.

10 So all these simulations demonstrate that UNC can achieve
11 diversity, not only with respect to its existing levels of
12 racial diversity, but also socioeconomic diversity, greater
13 diversity.

14 I want to talk a little bit about some of the criticisms
15 that we heard about Mr. Kahlenberg's simulations. Dr. Hoxby's
16 standard, to begin with, I think was far too exacting for what
17 the Supreme Court requires in this process. As we talked about
18 at the beginning, the standard under the Supreme Court is that
19 the race-neutral simulation needs to work about as well. It
20 needs to be a workable solution. It does not necessarily need
21 to hit particular numbers. Dr. Hoxby's analysis -- and she
22 testified about this -- was framed only in terms of whether the
23 replications could hit UNC's current actuals. And by
24 "actuals," she meant not only the average test score, but she
25 meant the precise numbers of students in each URM category. If

1 it did not reach that, she considered it an unsuccessful
2 simulation.

3 Even setting that aside, she acknowledged that at least it
4 was theoretically possible that a race-neutral simulation might
5 be available, although she did not run a simulation that went
6 this far. But she acknowledged that it was theoretically
7 possible and you could even meet her unnecessarily exacting
8 standard for precisely replicating the level of racial
9 diversity in test scores in the class.

10 She also -- I think her -- you remember the testimony that
11 I think kind of underscores the fundamental incoherence of both
12 her opinions. She attempts to assert that race is playing a
13 very, very small effect in the admissions process; it is not,
14 you know, a major driver or a predominant fact in whether
15 someone gets in or not, and yet it is also very, very difficult
16 to model a race-neutral alternative.

17 And I think the only way to reconcile those two pieces of
18 testimony -- race is not having a big effect, but also there is
19 no race-neutral way to achieve anything close to what UNC is
20 doing -- the only way to reconcile that process is if you hold
21 to this kind of artificially specific standard that she
22 applied: That you actually have to replicate the very precise
23 numbers, the very precise test scores of the admit class; and
24 even if you're just off by a few students here or there, that's
25 an insufficient solution. I think that underscores why that

1 standard is the only way in which she can find there are no
2 workable race-neutral alternatives and reconcile with her prior
3 opinion.

4 As for Professor Long, I don't think her opinions have
5 provided much help to UNC in this case. She certainly offers
6 her own observations on various studies that were made in this
7 area, but, as you may recall, she is not here to offer any
8 opinion on what UNC could actually implement. She doesn't
9 offer any opinion on what are the necessary thresholds for
10 critical mass for UNC.

11 She certainly disputed how generally available richer
12 socioeconomic data may be for students -- or for colleges who
13 wanted to prioritize SES status, for example.

14 But she couldn't dispute at least one study that
15 Mr. Kahlenberg testified about where UCLA law school had
16 actually been able to find and deploy richer socioeconomic
17 criteria about wealth. She couldn't dispute that that
18 information is available on the FAFSA form and the CSS. There
19 is a question about how many people completed it, but she could
20 not testify as to whether UNC had access to that information,
21 how many people were completing that information who were
22 applying to UNC. And I think the evidence at trial indicates
23 that, just as UNC asks its applicants for specific essay
24 answers, just as it asks its applicants to complete their
25 own -- the CSS Profile, UNC is certainly capable of acquiring

1 richer socioeconomic data if it wants to.

2 In any event, that's kind of beside the point because none
3 of the simulations we just looked at, none of the simulations
4 that Mr. Kahlenberg testified about actually relied on greater
5 wealth data being available. That was all based on information
6 that was either available through the UNC applicant data that
7 was produced in this case or through the high school data,
8 which is presumably easy enough for UNC to obtain since it
9 obtained it for purposes of running their analysis here.
10 Professor Long's other -- and, of course, Professor Long did
11 not offer any opinion on simulations one way or the other.

12 Professor Long's other opinion was to contend that more
13 selective schools -- and she put UNC in the same bucket -- have
14 a hard time replicating the precise levels of racial diversity
15 through race-neutral alternatives. She set to minimize all the
16 successful efforts on this front in the studies from the
17 University of Arizona, Colorado, Florida, Texas, and
18 Washington. She preferred to focus on the California schools
19 and Michigan. Of course, that meant that she had to at least
20 dismiss in some ways the recent success of the California
21 schools, which the testimony at trial indicated -- everybody
22 agrees it has made strides at least in recent years of
23 replicating or at least getting closer to the levels of racial
24 diversity that they had before.

25 But more importantly is that this testimony and this

1 attempt to kind of wall off the studies from less competitive
2 universities and put UNC in a different category isn't based on
3 UNC's own efforts, because Professor Long did not review any of
4 the deposition testimony or the records of UNC. At no point in
5 the 17 years after *Grutter* is there evidence that UNC had
6 conducted the kind of analysis she did and somehow concluded
7 that they are more like Michigan and California and they're
8 less like Arizona and Washington.

9 In fact, as you may recall, Professor Long's focus here was
10 really on an article by Mr. Kahlenberg and Potter that was the
11 subject of an e-mail from a former Department of Education
12 official to UNC to include in the working group report -- to
13 update their report to address these kinds of articles and the
14 articles that appeared in the precise book; and, of course, we
15 know that suggestion was rejected. It never made it into the
16 discussion that UNC had done.

17 More importantly, we have evidence in the record that UNC
18 has used benchmarks and looked to other universities as
19 comparable universities, specifically when discussing racial
20 diversity, and that's what's shown on the screen here. This is
21 PX59. It's admitted in the record.

22 This is an e-mail that Steve Farmer sent to Jim Dean
23 identifying a number of universities who are either designated
24 as peer universities by the UNC system itself, that are top 30
25 national universities or that are other AAU universities. In

1 other words, Steve Farmer went out and prepared a list of
2 universities that they considered their peer universities for
3 purposes of comparing how they're doing on racial diversity.
4 And when one looks at those universities, what's striking about
5 this is that you're going to see a lot of schools that we just
6 talked about that have implemented race-neutral alternatives
7 that have done so successfully.

8 On the first set here, this is the peer university, the
9 University of Texas appears on that list right next to
10 UNC-Chapel Hill. On the AAU list, if you look, there's a
11 number of universities: Florida, which has successfully
12 implemented race-neutral alternatives; Arizona, which has
13 successfully implemented race-neutral alternatives. There is
14 Texas again, which did so for a number of years. There is --
15 the University of Colorado is on this list, which at least
16 briefly was under a race-neutral regime; Texas A & M, which has
17 successfully implemented race-neutral alternatives; the
18 University of Washington, again, another university that has
19 successfully implemented race-neutral alternatives.

20 The evidence in this case, I think, leads to the necessary
21 conclusion that UNC rejects these approaches because they don't
22 want to succeed in finding a race-neutral alternative.

23 Although UNC's officials may believe that their indefinite
24 commitment to the use of race comes from a benevolent place,
25 that they can and should be trusted to use race in a

1 responsible manner to achieve goals that they consider to be
2 laudable, there's a reason that the United States Constitution
3 renders any use of race as a highly suspect tool. Racial
4 classifications have always been classified as being in the
5 best interest of those against whom they are deployed.

6 And as one Justice has aptly noted: The Constitution
7 abhors classifications based on race, not only because those
8 classifications can harm favored races or based on illegitimate
9 motives, but also because every time the government places
10 citizens on racial registers and makes race relevant to the
11 provision of burdens or benefits, it demeans us all.

12 The evidence makes clear that UNC does not take the
13 requirements of the whole protection seriously and that it will
14 not forfeit its use of race voluntarily. It falls to the Court
15 to step in and enforce the law in this area. We respectfully
16 request that it do so.

17 We thank the Court for its time and attention to this
18 matter, and we request that it order the University of North
19 Carolina to cease its use of racial classifications in its
20 admissions process.

21 Thank you, Your Honor.

22 **THE COURT:** Thank you.

23 Do you anticipate about an hour and a half for yours?

24 **MS. BRENNAN:** We do, Your Honor.

25 **THE COURT:** All right. Why don't we take our

1 afternoon recess, and then we will resume -- why don't we get
2 back here at a quarter of so we can get started.

3 **MR. FITZGERALD:** Thank you, Your Honor.

4 **THE COURT:** Yes.

5 (An afternoon recess was taken from 2:35 p.m. until
6 2:45 p.m.; all parties present.)

7 **THE COURT:** UNC.

8 **MS. BRENNAN:** Thank you, Your Honor.

9 And may it please the Court. I, too, would like to begin
10 by thanking the Court and its staff on behalf of the university
11 and our trial team. The university very much appreciates the
12 opportunity to defend this important case under the
13 circumstances with a live trial to the greatest extent
14 possible.

15 In our opening argument, we told you that what's going on
16 at UNC is people striving earnestly to create the best possible
17 environment with the best possible students using human
18 judgment. They're doing the right thing for the right reason
19 in the right way, and the testimony has established this.

20 I will be addressing first the university's compelling
21 interests; second, how the university's holistic admissions is
22 narrowly tailored to achieve the university's goals; and, third
23 the university's good-faith consideration of race-neutral
24 alternatives. Mr. Fitzgerald will be addressing the expert
25 testimony, including why the expert testimony does not change

1 the facts in this case.

2 And I'll start with the burden in this case, which
3 Your Honor is very familiar with, and just simply state that
4 there's two burdens, one related to compelling interest and
5 second related to narrow tailoring. We have met both of the
6 burdens in this case.

7 And I'll note before beginning that we will highlight some
8 testimony and evidence in our closing, but we will provide more
9 detail and specific citations in our posttrial submissions.

10 First, turning to the compelling interest, the university
11 has a compelling interest in diversity; and if you look at the
12 legal standard here, the Supreme Court has recognized that
13 attaining the educational benefits that flow from a diverse
14 student body is a compelling, constitutionally permissible
15 goal; and the decision to pursue those benefits is something
16 that the Supreme Court said "is, in substantial measure, an
17 academic judgment to which some, but not complete, deference
18 is" owed. Thus, a university's reasoned, principled
19 explanation for its decision to pursue the educational benefits
20 of diversity deserves considerable judicial deference.

21 The university's compelling interest has been conceded in
22 this case, but it has also been established. There are four
23 established facts related to this interest. First, UNC has
24 exercised its academic judgment; second, UNC is deeply
25 committed to achieving the educational benefits of diversity;

1 third, the holistic approach is the permissible means that the
2 university has adopted to achieve these benefits; and, fourth,
3 UNC has carefully assessed the achievement of these benefits
4 and reasonably determined that there is more work to do.

5 Turning to the first fact, that the university has
6 exercised its academic judgment, UNC, in its academic judgment,
7 has decided that racial diversity yields specific and
8 compelling educational benefits that are very important to
9 provide to its student body. What is the university's
10 reasoned, principled explanation? It is the long-time
11 recognition that diversity is a critical component of
12 excellence. The benefits are not theoretical, but they are
13 real. They occur both inside and outside the classroom, and
14 the university very much wants these benefits for its student
15 and faculty, and the students want them too. UNC bases this
16 judgment and its considerable expertise in its special
17 understanding of context, and the pursuit of these benefits has
18 been well documented over time.

19 On this next slide we've shown some of the places where you
20 can see the documentation of the pursuit of these benefits:
21 The mission, the academic plans, the faculty resolution and the
22 provost report, which actually articulates the five specific
23 areas that the university pursues benefits in and shows that
24 those are the same benefits that align with what the Supreme
25 Court has said is permissible. The faculty in its resolution

1 made clear that this is an important part of the pedagogy at
2 UNC. So this is at the very heart of UNC's academic judgment.

3 And as the Supreme Court has made clear, UNC's judgment is
4 entitled to First Amendment deference. While the university
5 also pursues socioeconomic diversity, that should not be
6 confused with its interest in racial diversity. Racial
7 diversity has unique benefits that are extremely important, and
8 Mr. Farmer testified about that. He talked about the fact that
9 it's important that students have the experience of living and
10 learning alongside other students of other races and
11 ethnicities, because that's the world that they will join; and
12 then he talked about how the conversations they will have will
13 be richer, the discoveries they make will be better, the
14 discussion -- decisions that they make will be better informed
15 as a result of their experiences with students of other races
16 and ethnicities.

17 And SFFA's own expert does not dispute that racial
18 diversity relates to educational benefits and simply says
19 socioeconomic diversity does as well. But racial and
20 socioeconomic diversity are both important, but not the same.

21 This would be enough to establish the university's
22 compelling interest. In addition, however, each of the five
23 types of benefits are set forth in the provost's report and
24 then further supported and illustrated throughout the record.
25 And we've provided you with a slide. I know that this trial

1 was very streamlined, but there's a great deal of testimony
2 that's in the record through declarations, and we have provided
3 in this slide an example of each of the types of educational
4 benefits and the ways that they play out in the real world at
5 UNC and they affect people's lives.

6 So, for example, diversity being necessary for a robust and
7 fully inclusive conversation about the history of the South;
8 students learning from diverse classmates who had been involved
9 with traffic stops and how that provides a powerful and
10 impactful learning moment; diversity providing fertile ground
11 for innovation in a research lab; UNC making a student
12 confident in her ability to work with, coach, and teach others
13 who do not look like her and have not had the same experiences;
14 and then two students, a black male from a wealthy suburb and a
15 white male from rural North Carolina, becoming study partners
16 and learning a real lesson about implicit assumptions. These
17 declarations further illustrate these benefits are real, and
18 they matter to people at UNC.

19 Instead of disputing this, SFFA claims that a ruling in its
20 favor will require no sacrifice of racial diversity. But
21 SFFA's contention is false. Even setting aside Count III, as
22 we have done for purposes of this trial, SFFA wants to force
23 the university to adopt an alternative that, as Mr. Fitzgerald
24 will discuss later, will not work about as well at UNC. So
25 this is all very much on the line.

1 I'll highlight one witness declaration that makes the
2 choice at hand very clear, and that's the declaration of
3 Richard Vinroot. He is a white male. He was the former mayor
4 of Charlotte and a former Republican nominee for governor of
5 North Carolina. He attended UNC on a Morehead Scholarship,
6 played basketball for Coach Smith, and graduated in 1963. He
7 only had three or four African American classmates in his
8 entire class. He was fortunate to have dinner with Martin
9 Luther King, Jr., as a student at UNC and that got him thinking
10 more about diversity. Vinroot's three children later attended
11 UNC-Chapel Hill. Their experiences included hearing, seeing,
12 and living with diverse individuals.

13 And Mr. Vinroot provides the following testimony: "Many of
14 my peers have overcome the lack of diversity, as I hope I have,
15 but some reflect the lack of diversity and sensitivity. I do
16 not know of anyone in my kids' generation who does not have a
17 broader and better view of the world in which they live than
18 people in my generation simply because of their broader
19 experiences. Without diversity, UNC would create warped
20 graduates who are technically sound but lack the humanity we
21 brag about at UNC. We are a university of the people and for
22 the people. We would not be true to our mission without
23 diversity of all kinds, in my opinion. I've always felt better
24 about UNC as a place that believes in the value of diversity."

25 When Mr. Vinroot looks at his yearbooks, he sees a lot of

1 people that look like him. When his children and the students
2 today look at theirs, they see a very different picture. What
3 will UNC look like tomorrow? This case will impact who each of
4 the 4,000 students who arrive in Chapel Hill each August see
5 next to them. Will UNC be able to provide them with the full
6 experience that UNC, in its academic judgment, believes that
7 they should have?

8 The second fact is that UNC is deeply committed to
9 achieving the educational benefits of diversity. I only
10 address this briefly because SFFA has not made a serious
11 challenge to the university's commitment and sincerity. UNC
12 has never said that it is perfect in all respects, and our
13 witnesses were very clear there's a lot more work to be done.
14 On the other hand, the evidence is substantial that the
15 university has made deliberate and sustained efforts to pursue
16 the educational benefits of diversity, and the next slide shows
17 some of those programmatic efforts or where there is evidence
18 about them and that can be found.

19 The provost report provides a detailed discussion of what's
20 the -- some of the university's efforts are. We've also
21 submitted the report of Mitchell Chang.

22 And I want to just say a word about Dr. Chang because he
23 was not one of the live witnesses in this case, but he has 30
24 years of experience studying issues of racial diversity in
25 higher education. He's at UCLA. And he assessed the

1 university's programming and -- including things like affinity
2 groups, housing initiatives, campus discussion forums,
3 mentoring programs, and the like; and he observed that UNC
4 systematically and effectively engages diversity in an attempt
5 to intentionally create the conditions for the achievement of
6 the educational benefits of diversity.

7 You also heard in this case from Dr. Panter about many
8 efforts that are being done in the academic space in order to
9 ensure that students can collaborate with each other and learn
10 in that way.

11 And then we have listed here three declarations from
12 witnesses who will testify through their declaration as to some
13 of the efforts that are being made at UNC outside of the
14 classroom. And that's the Blattner, King, and Crisp
15 declarations.

16 The third fact: The holistic approach is the permissible
17 means that UNC has adopted to achieve the educational benefits
18 of diversity, and the next slide is from the Faculty Advisory
19 Committee guidance, which you saw during the testimony, and it
20 sets forth a holistic admissions system. Specifically, if you
21 look at the bottom paragraph, it states: "In shaping the
22 class, we evaluate individual candidates rigorously,
23 holistically, and sympathetically." So this is echoed also in
24 the reading document, and the evidence is very clear that the
25 system is holistic. That was also conceded by Plaintiff's

1 expert, Professor Arcidiacono.

2 And UNC witnesses explained what holistic review means in
3 practice. The next slide is from the testimony of Mr. Farmer
4 where he talked about holistic review, and he starts by saying
5 that "holistic review means that we try to make sense of whole
6 people. We try to make sense of candidates as human beings."
7 He goes on to say, "Holistic admission really means that we
8 focus on the best in young people, that we try to see the best
9 in them, that we try to make sense of them, where they come --
10 if -- what they care about, what they're good at, what they've
11 struggled at, what they can get better at, what difference
12 they'll make in the lives of the people around them and in the
13 lives of other people who are going to depend on them forever."

14 Mr. Rosenberg also testified about what holistic review
15 means and how they train their readers. He stated that "We
16 want to train readers to meet our applicants where they are and
17 understand that they all come from different walks of life and
18 that context is extremely important to consider as you make the
19 decision."

20 We'll talk more about the admissions process in a moment
21 and the consideration of race, but there's no dispute that this
22 is a holistic process. And race is one factor, among many
23 other factors, in who people are, and where they choose to
24 provide it, it should not be erased in trying to understand
25 them as individuals.

1 The fourth fact is that UNC has carefully assessed the
2 achievement of the educational benefits of diversity and
3 reasonably determined that more work is needed. The testimony
4 shows that UNC has paid careful attention to its achievement of
5 the educational benefits of diversity. You heard testimony
6 from Steve Farmer that he has continuously been in discussions
7 with leadership on the campus and each year sharing the
8 admitted class profile. He's talking to students and others on
9 campus, and he's getting their feedback. He's paying attention
10 to the numbers, along with the qualitative feedback.

11 You also heard testimony from Dr. Farmer -- I'm sorry --
12 from Dr. Panter. UNC has done numerous surveys and assessments
13 over time to obtain information from students relevant to the
14 educational benefits of diversity, and Dr. Panter testified in
15 detail about those efforts. That includes the HERI climate
16 survey. It includes specific questions from course
17 evaluations, which we saw some examples of, and much more
18 information. And Dr. Panter talked about how they review that
19 information and they apply it. They use that information to
20 actually improve their teaching and their delivery of the
21 educational benefits of diversity.

22 We also heard testimony about a substantial effort to
23 formalize and centralize the assessment in 2017 following
24 guidance from *Fisher II* with the formation of the Educational
25 Benefits of Diversity Working Group, and that work is

1 summarized in DX5. We heard about how that group collected
2 prior assessments, so they made sure that they centralized and
3 knew what assessments were occurring, including national and
4 local surveys. They reviewed key data on this topic, and they
5 developed a state-of-the-art assessment plan that will assess
6 students' experiences starting when they arrive at UNC, or even
7 prior, and going through their alumni status. Their goal is to
8 be a national leader in this area.

9 Now I want to talk for a minute about Plaintiff's focus,
10 which has been critical mass. SFFA claims that the only
11 permissible goal is to enroll a critical mass of
12 underrepresented minority students. SFFA then claims that the
13 university fails strict scrutiny because it hasn't sufficiently
14 defined its critical mass pools and they are not measurable.
15 SFFA attempts to use critical mass as a trap. On the one hand,
16 SFFA attempted to obtain a numerical goal from many of UNC's
17 witnesses. They even showed in their closing and you heard in
18 testimony the question that they asked Dr. Panter at her
19 deposition about whether certain levels of racial diversity
20 would be sufficient. That, of course, would be an
21 impermissible quota, and UNC doesn't have quotas and so they
22 were not able to provide a specific number.

23 SFFA then switched tactics to suggest that because there's
24 no specific numbers, UNC's definition of critical mass was too
25 amorphous, and, therefore, UNC failed strict scrutiny. But the

1 Supreme Court has explained that the permissible compelling
2 interest is not a specific number. It is in the educational
3 benefits of diversity, and as discussed, the pursuit of those
4 educational benefits sets a clear goal, and the university's
5 work is tied to that goal, and the goal is assessed.

6 Notably, however, UNC does pursue critical mass as a
7 component of achieving the educational benefits of diversity.
8 Plaintiffs in their closing showed the reading document where
9 it states that critical mass is an aim of the university, and
10 that was confirmed by witnesses, including Mr. Farmer.

11 Now, SFFA says that UNC's witnesses couldn't define it, but
12 that is not the case. UNC's witnesses have consistently said
13 that there's a numerical component, but it's also contextual.
14 And I'll note, you know, that defining it can be tricky because
15 at bottom this is a legal construct that we're talking about.
16 Nonetheless, all of the witnesses consistently had some
17 understanding that it's not simply numerical; there's also
18 another component to it.

19 And if you look at the testimony of Dr. Kretchmar, she
20 illustrated it well. She said, "I can go through what I
21 understand to be the educational benefits of diversity. So we
22 think of critical mass in terms of its outcomes, and I think
23 one of the ways we try to determine if we've achieved it is by
24 asking our students whether we've created the environment for
25 them that they say they want in terms of studying and living

1 alongside people who are different from them."

2 You will see similar definitions in the testimony of
3 others, and if you look at the full testimony of Taffye
4 Clayton, who used to be head of the Office of Diversity and
5 Multicultural Affairs, you'll see that she actually had a very
6 good understanding of critical mass, including her statement
7 that it can be amorphous. She then goes on to further explain:

8 "And certainly it would be no surprise that some
9 lower-level admissions officers may not use the term 'critical
10 mass' on a day-to-day basis in connection with their work, so
11 there's nothing surprising about that, nor would it be their
12 job to do the assessment efforts. Those are things that are
13 being done by Mr. Farmer, Dr. Panter, and others at a higher
14 level."

15 SFFA then says that UNC's objectives are not measurable.
16 Again, this is not just a numerical concept, so it's not simply
17 pulling out a ruler and seeing where the university is. We
18 heard that the university has paid careful attention to these
19 issues. The documents confirm that critical mass was discussed
20 at UNC. Plaintiff showed one of those in their -- in their
21 opening, and you can see a couple of them on the screen. But I
22 think much more importantly the testimony and the documents
23 establish that the university is regularly discussing and
24 assessing issues related to the achievement of the educational
25 benefits of diversity, as you heard from Mr. Farmer and

1 Dr. Panter.

2 Now, SFFA also argues that the Court cannot assess whether
3 the university is done with the need to consider race if the
4 university doesn't provide a detailed definition that seems to
5 include some numbers. That is simply not the case. The
6 evidence is very clear that the university is working hard at
7 this but is not there yet, and the Court can confirm that
8 through substantial evidence in the record. That includes the
9 university's own assessment and document such as the provost
10 report. It includes testimony, which you'll see in our next
11 slide, from Mr. Farmer and Dr. Panter where they talk about the
12 work being far from complete. Mr. Farmer talked about that
13 particular year where -- where it was really tough for the
14 students, and it led them to believe they needed more diversity
15 than we've been able to give them. Dr. Panter talked about "We
16 are not done. We are not done. There is a lot of work to do
17 in many different spaces."

18 The expert assessments also confirm this. You will see in
19 Dr. Chang's report that he talks about this issue and the fact
20 that this work is very complicated and challenging, and it is
21 an ongoing iterative process. So there is much more work to be
22 done at UNC, and he based that on his review and evaluation of
23 substantial survey data at the university over time.

24 You'll also see additional evidence of this in many of the
25 declarations in the record. Just to provide one example, there

1 are faculty declarations to this effect in the record. One of
2 them is from Professor Cuadros, who teaches in the School of
3 Journalism. He talks about the challenges for diversity in the
4 School of Journalism, and he concludes: "We cannot effectively
5 teach our students these key skills that they will need to
6 achieve in the workplace without greater diversity."

7 You've also heard information from students. You've heard
8 the Intervenor's very compelling testimony, and there are other
9 declarations in the record from students as well. Some that
10 come to mind are Merrick Osborne, Ashley McMillan, and Jordan
11 Peterkin, who is one of the 98 black males who started in 2013,
12 among others; and they talk very compellingly about the
13 challenges that they have faced.

14 Significantly, there has been zero evidence from SFFA that
15 the university has reached a critical mass and can stop working
16 at this. SFFA has offered no expert to assess the university's
17 achievement of the educational benefits of diversity, and SFFA
18 has presented no contrary evidence on this point. So whatever
19 the day is where the university reaches critical mass and can
20 fully realize the educational benefits of diversity without the
21 consideration of race as a factor in its admissions process,
22 that day is not today.

23 I'll turn now to the second burden that the university has
24 in this case, and that is the university's consideration of
25 race is narrowly tailored. There are two established facts

1 here: One, race is not the predominant factor in admissions
2 decisions; and, two, UNC has given good-faith consideration to
3 race-neutral alternatives. I will address our factual evidence
4 that fully establishes this, and Mr. Fitzgerald will add the
5 expert evidence.

6 The first key fact relates to the holistic admissions
7 process. And your Honor is also very familiar with this case
8 law, but we have a slide with the legal standards talking about
9 admissions programs have been approved where they're highly
10 individualized, holistic review of each applicant's file,
11 giving serious consideration to the ways applicants might
12 contribute to a diverse class, and while a university may use
13 race as a plus factor, race cannot be the predominant factor in
14 decision-making.

15 So you've also heard in this case from four witnesses about
16 the admissions process. You heard from Steve Farmer, the vice
17 provost for enrollment; Jen Kretchmar, the social director for
18 research; Jared Rosenberg, the associate director for
19 evaluation; and Michael Davis, the associate director for
20 recruitment. These witnesses are good people. They're
21 hardworking, caring, and honest; and they know a lot about what
22 is happening in the admissions office. Mr. Farmer started
23 there in 2000. Mr. Rosenberg started in 1999, and
24 Dr. Kretchmar started there in 2002. They were all credible
25 and consistent about how they think about and review

1 applications.

2 Mr. Farmer and Mr. Rosenberg explained how the process
3 works. It's a highly selective process that involves difficult
4 decisions, and Mr. Rosenberg specifically walked through an
5 application to show how he and his readers make their
6 decisions. This testimony demonstrated that the university's
7 holistic process complies with the law. You heard from
8 Mr. Farmer and you saw in the reading document that there's no
9 quotas; there is no automatic points; applicants are not
10 reviewed in any separate categories or under separate
11 thresholds with different standards. In fact, UNC has exactly
12 the type of holistic and individualized admissions system that
13 has been approved by the Supreme Court.

14 Key to this is that race is only one factor among many. As
15 you see in the reading document, UNC considers a whole variety
16 of factors when it evaluates applications, and it talks about
17 40 criteria that may be considered at every stage in the
18 admissions process. Primary among them are academic factors
19 and other qualities that the university seeks, and this is not
20 an exhaustive list. Only one of those factors is race.

21 You also saw proper guidance in the reading document on
22 race and its consideration as a -- and its appropriate
23 consideration in the process, and Steve Farmer confirmed that
24 that is how it actually works in practice. Jared Rosenberg
25 also explained -- and we have some testify from him -- he says,

1 "If race is disclosed, it's one of many factors." And then he
2 goes on to say, "To the extent that we do consider diversity in
3 our class, race and ethnicity would be one of many factors that
4 we think about when reading an application, just as we would a
5 first-generation college student or a fee waiver or a low
6 socioeconomic student."

7 I want to go back and just take a moment to look at one of
8 the allegations that was in SFFA's complaint. SFFA, in its
9 complaint, made some fairly impressive allegations. They
10 include that strict scrutiny has proven to be no match for
11 concerted disinformation hidden behind the veil of holistic
12 admissions. That allegation has not been proven. There's no
13 factual evidence of any cheating at school group review or
14 otherwise. There's no factual allegation -- or factual
15 evidence of any racial balancing and, in fact, you saw very
16 little cross to establish any wrongdoing. SFFA has pointed to
17 core reports, but they did not show that those are being used
18 for any proper purpose -- any improper purpose, and those have
19 not been used in any manner since 2015.

20 SFFA claims that there was little time spent on reviewing
21 each application and that the -- some of the ratings were
22 calibrated, but the UNC admissions office gets 40,000
23 applications a year, and of course it has to review them
24 efficiently. That does not mean that they're not applying the
25 holistic and individualized review that they testified to. And

1 the fact that there's some consistency on some ratings, such as
2 program rating, does not show anything other than the fact the
3 admissions office is being fair. It does not show or suggest
4 that the readers are not looking at individual characteristics
5 in exactly the way that they talked about.

6 Now, to the extent that SFFA has relied or may later try to
7 rely on documents that they didn't ask our witnesses about, I'd
8 like to make a couple of points. There -- there were more than
9 300,000 pages of documents produced in discovery. SFFA had
10 access to reader comments on applications for four admission
11 cycles, so for more than 120,000 cycles. SFFA didn't show you
12 a single reader comment on an application that would suggest
13 that readers are doing anything other than what Steve Farmer
14 and Jared Rosenberg have sworn to under oath. And to the
15 extent that they later try to make an argument with some
16 documents, we urge the Court to recall that they had four
17 admissions officers and the head of the Advisory Committee on
18 Undergraduate Admissions here, and they didn't make their case.

19 Now, SFFA claims that there's an implicit formula, but
20 Mr. Farmer and Mr. Rosenberg explained that that is not how
21 they think about things and that there is no formula. The next
22 slide shows some of Mr. Farmer's testimony to this effect. He
23 states, "There is no formula. We don't think formulaically
24 about complicated people, and every person who comes to us is
25 complicated." He says, "We feel we owe them, that we have a

1 duty to them to consider them as whole complicated people and
2 not just subject them to some formula, implicit or explicit,
3 that doesn't do justice to their achievement and their
4 potential and their uniqueness." He says, "Further, I don't
5 know what this formula is. We've never talked a formula. I
6 don't think 40 people have an implicit formula."

7 SFFA also claims that the university is overweighting race,
8 but there no factual evidence of that either. SFFA notes that
9 UNC didn't test the role of race when the admissions office did
10 other studies, but they -- the university and the admissions
11 office looked at other issues as they arose when they had an
12 inquiry or when they were thinking about a policy change.
13 There was never any indication that that's been the case with
14 race, and they told you that they never thought to do that
15 about race because they were confident in how they were
16 considering it.

17 And how did they have that confidence? Jared Rosenberg
18 testified how it works. He's a second reader, and he
19 participates in decision review. So he has the opportunity to
20 read behind everyone multiple times, many, many times
21 throughout the year, and he goes on to state, "I open hundreds
22 of applications and read comments and understand the thought
23 process behind different people's decisions, and so over time I
24 can gain confidence in individual readers that they are
25 considering all aspects of an application, that they've done

1 the individual comprehensive and holistic review, and that
2 they're appropriately considering race as one of many factors
3 that they can think about when reading the application."

4 Steve Farmer also testified about quality controls within
5 the admissions process and expressed his confidence in the way
6 that the process works.

7 In addition, the current Committee on Race-Neutral
8 Strategies actually did run that test, and it confirmed
9 factually what the admissions office thought. The Data
10 Analytic Subcommittee confirmed that race plays an important
11 but minimal role in the process, and that finding is reflected
12 in DX4, the interim report of the Committee on Race-Neutral
13 Strategies. So the factual testimony in this case fully
14 confirmed that when it comes to admissions, UNC is doing this
15 in the right way.

16 The second fact is that the testimony shows that the
17 university has given good-faith consideration to race-neutral
18 alternatives, and here we've also provided some of the legal
19 standards related to this consideration, and I'd liked to just
20 address with respect to these standards what the requirement is
21 and what it isn't.

22 The Supreme Court requires that the university give
23 serious, good-faith consideration to workable race-neutral
24 alternatives, but they're also clear that exhaustion of every
25 conceivable race-neutral alternative is not required.

1 Importantly, the Supreme Court does not specify how the
2 university must consider race-neutral alternatives, such as the
3 running of simulations, as Plaintiffs have suggested. Now, the
4 evidence fully supports that this is an issue that the
5 university has paid very close attention to for many years and
6 that they have engaged in various efforts to consider
7 alternatives. Those efforts were reasonable, and they were
8 undertaken in good faith.

9 And in addition, the university did not stop there. It
10 actually implemented several race-neutral strategies, including
11 diversity recruiting efforts and generous financial aid.
12 That's important. The university did not just talk about this
13 in theory. It actually adopted those -- those programs and
14 spent millions of dollars to improve access and increase
15 diversity through race-neutral strategies.

16 Now, we have also prepared a timeline, and ours looks a bit
17 different than Plaintiffs because it includes some additional
18 things that they're not giving UNC credit for, and I'll walk
19 through just some of the things on this timeline.

20 In 2004, Mr. Farmer and other admissions office leaders
21 began regularly attending meetings of the College Board's
22 Access & Diversity Collaborative. And Mr. Farmer testified
23 that they were paying close attention to the natural
24 experiments that were occurring out there in different states
25 that had banned consideration of race, and they were also

1 discussing these issues with other schools.

2 In 2007, Mr. Farmer conducted an analysis of a low-SES
3 plan.

4 In 2009, he tasked Dr. Kretchmar, who was head of research,
5 with conducting a literature review.

6 Then in 2012, Mr. Farmer and Dr. Kretchmar conducted an
7 analysis of a top 10 percent plan. Now, SFFA claims that this
8 was only for the *Fisher* litigation effort, but there is a lot
9 of overlap in this area between the work and litigation, as
10 well as the broader legal environment that they were operating
11 in, and that doesn't mean that the effort wasn't part of UNC's
12 overall thinking and analysis.

13 In September of 2013, they began planning and having
14 discussions about a new working group to consider race-neutral
15 alternatives, and that fall invitations for the new
16 race-neutral alternatives working group were sent out, and that
17 group began to meet.

18 You then heard that in October of 2014, the working group
19 drafted a white paper summarizing all the work that it was
20 doing in the interim time. They had gotten data from the
21 NCERDC, and they had run simulations on several different
22 race-neutral alternatives, including a 10 percent plan and a
23 4 1/2 percent plan; and that work is in the record. This is a
24 much better effort than Dr. Kretchmar would give herself credit
25 for, and the people who received it considered it that way.

1 Mr. Farmer and Dr. Panter both testified that they considered
2 this a very good piece of work, and it became the basis for the
3 next committee's efforts.

4 In February of 2016, the Advisory Committee for
5 Undergraduate Admissions approves the working group's white
6 paper, and they establish the Committee on Race-Neutral
7 Strategies.

8 You see after that on the timeline that the subcommittees
9 began doing their work and providing various updates to both
10 the larger group and to the Advisory Committee; and in May of
11 2018, the Committee on Race-Neutral Strategies issues its
12 interim report to the chancellor and the provost. And whatever
13 Plaintiffs want to say about that effort, it's in the record,
14 and Your Honor can review it. It's an extensive, detailed, and
15 good-faith effort that included experts in their fields,
16 including about modeling, and people who were experts in the
17 student experience and people who were experts in looking at
18 the literature. And that all came together for a very
19 extensive analysis.

20 And the work continued after that report, and the group
21 continued to provide updates. I would note also that UNC
22 should get credit for the expert analysis that was done in this
23 case. The sets of reports from Drs. Hoxby and Long in 2018,
24 those were reviewed by the chair of the Committee for
25 Race-Neutral Strategies with plans at the time of the interim

1 report for review by the larger committee. Those reports
2 required significant resources and were part of UNC's
3 consideration of race-neutral alternatives.

4 The next line that you see on the timeline is where we set
5 forth the efforts to implement race-neutral strategies, and
6 this shows that those were also happening in the same time
7 frame.

8 In 2004, the Carolina Covenant was established. That's a
9 program for low-income students that allowed them to attend
10 debt free.

11 In 2006, UNC established the C-STEP program, a program to
12 increase the number of transfer students from community
13 colleges.

14 In 2007, the Carolina Advising Corps was founded, and that
15 put college advisors in underserved high schools throughout
16 North Carolina.

17 And over time these programs were enhanced and grown
18 significantly. And, of course, this is all in addition to the
19 ongoing recruitment and financial aid efforts.

20 And then in 2016, UNC was a founding member of the American
21 Talent Initiative, a program to increase access for talented
22 low- and middle-income students.

23 All of this establishes that the university did consider
24 race-neutral alternatives in good faith, but they haven't found
25 an alternative that meets the university's diversity in

1 academic objectives. You heard that from both Mr. Farmer and
2 Dr. Panter.

3 Now, SFFA claims that UNC didn't meet legal requirements
4 because it framed the question as seeking alternatives that
5 would result in equal or greater diversity in academics. UNC
6 had to set some kind of baseline, and the current one made,
7 especially because UNC is not where it wants to be on racial
8 diversity. Regardless, you heard testimony that UNC didn't
9 take anything off the table. They considered everything that
10 came close, and you can see -- we put testimony up from
11 Mr. Farmer and Dr. Panter. Mr. Farmer states, "We always
12 intended the term 'maintaining' to be a starting point. We
13 don't think of this process in terms of absolutes. We would
14 consider in good faith everything that was a serious
15 possibility." And Dr. Panter testified similarly, but nothing
16 has come close.

17 SFFA also claims there's no definition of "workable," but
18 you've heard that the Committee on Race-Neutral Strategies has
19 had discussion about what may go into that term and some of the
20 things that it includes, but that it needs to be a broader
21 discussion if and when they find something that will meet their
22 other objectives, and they are not there yet. They have tried
23 hard and with an open mind, but they did not find a viable
24 alternative, and that is not surprising because, as
25 Mr. Fitzgerald will tell you, it's not out there.

1 Before I turn this over to Mr. Fitzgerald to talk about the
2 numbers, data, statistics and experts, I want to leave you with
3 one last takeaway from Mr. Farmer. He testified in this case,
4 "Because at the end of it, our students aren't numbers.
5 They're people."

6 **MR. FITZGERALD:** May I proceed, Your Honor?

7 **THE COURT:** Yes, you may.

8 **MR. FITZGERALD:** Good afternoon. I will also express
9 my appreciation on behalf of myself, but also my client, to the
10 Court and court staff indulging us in a live trial. It's much
11 appreciated. I'll echo the mutual respect for engaging in this
12 trial with adversarial counsel on a very agreeable basis. And
13 with that, I'll turn to my argument.

14 Your Honor, the university, with regard to Count I, has
15 proven in multiple ways that race is not the predominant factor
16 in the admissions decisions. We started this case putting up
17 the slide framing the question as to whether or not UNC uses
18 race as the dominant factor in admissions decision. It's also
19 been framed -- that comes from *Grutter*, but *Grutter* also asks
20 the question whether or not race is the defining feature in an
21 application. We meet both those tests quite easily.

22 Ms. Brennan has reviewed with you what the facts are.
23 You've seen the evidence and the witnesses for yourself. Race
24 is not the defining feature of an application. People are
25 looked at as individuals. The expert testimony in this case

1 does not refute that or change that; it reinforces that. Let
2 me tell you what I mean.

3 First, Your Honor, this case is not breaking new ground on
4 the facts. The case we talk about so often, *Grutter* from 2003,
5 is remarkably similar. We will talk about that more in our
6 posttrial brief, but I'll frame it this way: In that case they
7 had a plaintiff's expert who testified that race had an
8 extraordinarily large influence on the admissions process.
9 That was his claims. And then there was evidence and claims by
10 the plaintiffs and recognition by the Court that race affected
11 a number of decisions -- a subset of decisions in the
12 admissions process. The claims there and here are very
13 similar.

14 The takeaway in *Grutter* wasn't that race couldn't make a
15 difference. That's sort of the point. You have to consider
16 things -- race, gender, background, all different things --
17 that can make a point. The takeaway is that in a proper and
18 holistic admissions process that considers applicants as
19 individuals, race can play a role in a subset of decisions. It
20 just can't play a dominant role. That is this case.

21 Now, the Plaintiff, and Professor Arcidiacono in
22 particular, don't want the question to be whether or not race
23 plays a dominant role in the admissions process and for a good
24 reason. They can't meet that test. We can disprove it. We
25 have. Professor Arcidiacono constantly wanted to measure

1 influences, factors in small groups and didn't want to talk
2 about how it affected the whole group, but that's the relevant
3 question we have to face. And in the end, Professor
4 Arcidiacono agreed that race was not a predominant factor, and
5 I'll review that with the Court now.

6 He was asked the question: "Question: You were -- the
7 question you were to address is whether race is a predominant
8 factor in UNC's admissions process. That was your assignment
9 as you described it in your first report, correct?

10 "Answer: Correct."

11 Then later on in his examination, he was asked: "So you
12 will agree with me that across the whole process of admissions,
13 considering all races, race is not the dominant factor?

14 "Answer: Yes."

15 He takes the position -- he doesn't like it being measured
16 across the whole process, but what it is, race is not dominant.
17 Professor Hoxby finds the same thing. There is agreement. We
18 could almost stop there, except I think we want to make a very,
19 very clear record in this case, because both experts agree that
20 across the process race is not predominant.

21 Now, if you look at Professor Hoxby's testimony, after her
22 analysis she testified that "My conclusion is that race and
23 ethnicity explain only a very small share of the admissions
24 process."

25 Now, Professor Hoxby explained the proper way to figure out

1 how to measure how much is explained, and I think at this point
2 I should briefly talk about the fact that Plaintiff and
3 Professor Arcidiacono keep talking about prediction rates and
4 accuracy, and we also talked about explaining power, and
5 they're two different things, and maybe I can give an example.

6 If there was a congressional election held in a district
7 and there were two candidates and -- one from each of the major
8 parties, you could walk around and try to predict how a voter
9 might vote. You might find out their age, their race, their
10 gender, their background, where they grew up, what they did for
11 a living, how far they went to school, all those sorts of
12 things. You might find out if they're registered with a
13 political party. If you knew all that, you could probably
14 predict pretty well which candidate they might vote for, but
15 that's a prediction.

16 If you wanted to ask them why they voted for someone, what
17 issue motivated them to vote for that candidate -- was it their
18 view on social justice, was it taxes, was it foreign policy,
19 was it immigration -- that's a harder question. He keeps
20 talking about the ability to predict. We're not here to
21 predict admissions. We're here to explain admissions, explain
22 what role race played, and race played a smaller share -- much
23 smaller share than test scores, for example. Race did not
24 dominate.

25 In that circumstance, Professor Hoxby explained there's a

1 | tried-and-true method that's been used since the 1950s. She
2 | explained that the Shapley decomposition has been around since
3 | the 1950s, and it's still the only method that satisfies the
4 | free axioms that statisticians require. The Shapley
5 | decomposition is designed to show the marginal effect of any
6 | factor reliably; and if, in fact, the factor was important even
7 | for a subset of applicants, but it was important for them, the
8 | Shapley decomposition would definitely show that.

9 | Professor Arcidiacono backhandedly concedes that. He was
10 | asked about Professor Hoxby doing a Shapley decomposition, and
11 | he fought it on the grounds that she's answering the wrong
12 | question. His testimony: "So what's going on here is that
13 | she's thinking about how race affects the entire admissions
14 | process, and I don't think that's the right way of looking at
15 | it." That is the right way of looking at it. That is a legal
16 | question in this case. She was right to look. She was right
17 | to do the Shapley decomposition process, which has been around
18 | for 70 years. And when she looked, she found that race was not
19 | the predominant factor. In essence, both experts agree with
20 | the ultimate conclusion, and she did the work to verify that.

21 | Now, it's a strange world where the Plaintiff's expert and
22 | the defense expert would agree on the ultimate conclusion,
23 | which means that Count I fails. But let's talk about the
24 | credibility issues between -- the difference between Professor
25 | Arcidiacono and Professor Hoxby and put it on the table.

1 Professor Arcidiacono claimed that he was not able to sort
2 out the influence of test scores toward admissions. We look at
3 his testimony here:

4 "You don't have the ability as an economist to tell us
5 whether or not getting high SAT scores has greater correlation
6 with the admissions outcome than race?

7 "Answer: There's not an actual way to measure that.

8 "Question: Did you make any effort to try to determine
9 whether or not SATs and grades were a more important factor in
10 the admissions process than race?

11 "Answer: No."

12 Your Honor will see in the *Grutter* decision, the expert
13 there conceded that race was not as important as test scores;
14 and in this case, Professor Hoxby calculated the influence of
15 test scores. The thing that you're not supposed to be able to
16 do, she did. Professor Arcidiacono could measure the influence
17 of race being a fee waiver candidate, missing rank, missing
18 GPA, but somehow test scores couldn't be calculated.

19 I next turn to the most concerning point about
20 Arcidiacono's testimony when it goes to his credibility, and
21 that's the issue where Professor Arcidiacono changed applicant
22 scores to something other than what they were in the process.
23 If the admissions officers were seeing scores in UNC -- if
24 people got the same score on the same test for the same day,
25 radically, they gave them the same credit, but not Professor

1 Arcidiacono.

2 If we look here at this chart that we had to go through
3 with him by asking him about files on his computer that backed
4 up his reports, we learned about the penalties imposed on
5 people who took the ACT test and then had to convert it to the
6 SAT; and remarkably, Professor Arcidiacono would not admit that
7 changing the scores of applicants who took the ACT to the SAT
8 and deducting a different amount of points based upon the race
9 and gender was a penalty. Here is that exchange:

10 "Question: If an applicant were a black female, under your
11 model she would receive a penalty for being black of 22 points
12 on the SAT and a penalty -- slight larger penalty of 23.6 for
13 being female, so a total penalty of about 45 points, correct?

14 "Answer: I don't view it as a penalty, but that is what
15 you get when you add those coefficients."

16 If you turn to the next slide, we illustrate the point.
17 He's supposed to be a first-rate economist modeling the process
18 of admissions. Admissions officers see a file. On the left is
19 what they would see in the real world if several different
20 folks who were applicants to UNC, different races and genders,
21 took the test and got the same score on the same day. They'd
22 all get a 1300.

23 On the right is his model. The white male applicant in
24 that circumstance would get a 1300. The Asian male applicant
25 would actually get a 1309, and then depending on whether you're

1 a black male or Hispanic male or American Indian, you get
2 different scores. And at the end, the black female would be
3 given 1254 for the same exact performance on the test, 46
4 points lower than a white male and 55 points lower than an
5 Asian male.

6 And yet his testimony is interesting: "Then your model is
7 going to take the same two people, a white male and a black
8 female who took the test on the same day and gave the same
9 answers..." -- and then continuing -- "...there will be a
10 difference between the white male applicant who will have a
11 higher score than the black female applicant...?"

12 "I think -- according to those regressions, correct."

13 Your Honor, I don't know where that comes from. We saw
14 some textbooks this morning flashed on the screen. I haven't
15 read them, but I hope there's nothing in a textbook on
16 economics these days that says that we should change scores
17 based upon race. This is supposed to be a standard
18 methodology.

19 What's most disturbing about it is this was pointed out to
20 Professor Arcidiacono. Did he say, "Wow, how did I make a
21 mistake like that? How did my model get so gummed up that it
22 does these crazy things? My bad. I'll fix it"? He stands by
23 it. It's in his preferred model he puts before the Court. He
24 stands there and says it's not a penalty, and he stands there
25 and says, "Maybe I did those applicants a favor." It makes no

1 sense. It's not credible.

2 What else does Professor Arcidiacono do? He uses a few
3 math tricks that I want to go through. First, he shows us some
4 statistics. The first part of it is this decile analysis where
5 he puts all the candidates into ten different deciles. A few
6 things about the decile analysis.

7 Number one, the decile analysis is something he created.
8 He makes an academic index, which UNC does not use. Then he
9 scores people on this academic index into ten different deciles
10 that UNC does not use. The idea of a decile analysis, it's not
11 a model. It doesn't account for all the other factors in the
12 world that might affect things. That's why you build a model.
13 The decile analysis is, pure and simple, not scientific. He
14 actually agrees with part of that. He agreed in his testimony
15 when asked, "You'll agree with me that the decile analysis by
16 itself is insufficient to show that the differences of
17 admission rates are the result of racial preferences, correct?

18 "Answer: Correct."

19 And lastly on the decile analysis, when he takes people and
20 makes them dots to go to the decile analysis, he is using his
21 academic index, which is based in part on the SAT; and when he
22 calculates the SAT, he's using that modeling that deducts
23 points from people who took the SAT based upon race and gender,
24 meaning some people are put in the wrong decile.

25 The second mathematical exercise he does is these -- are

1 these, quote, transformation examples, mathematics gone wild.
2 Here it is just written on a chart -- chart as if this is sort
3 of basic, changing the race of an individual. If you look at
4 the three points on the right, the first one recognizes that
5 you compare one hypothetical person generated by a model to a
6 different hypothetical person generated by the model.

7 I'll skip the second one for the moment.

8 The third part says it assumes away the portion of the
9 admissions decision that cannot be explained. Now, if we
10 recall, there's this unobservable stuff out there. That
11 includes personal essays, letters of recommendation, guidance
12 counselors. All that stuff is junked out of this model, but he
13 just thinks that he can predict what will happen when people
14 change race.

15 And then number two assumes one can change an applicant's
16 race and the rest of the applicants' life is unchanged. What
17 does Professor Arcidiacono and Professor Hoxby each say about
18 this?

19 You can skip to the next slide, Aaron. If you can go to
20 the next one.

21 Professor Arcidiacono says, "Obviously, people do not
22 change their race, but this is a standard practice in the
23 empirical world for economics. This is how we measure these
24 preferences."

25 Professor Hoxby diplomatically says in her answer, "This is

1 just not a sensible statistical thing to do under these
2 circumstances, creating models to predict and then changing
3 race and projecting outcomes."

4 And one last piece. I find it odd we've heard now today, I
5 think for the first time, that the admissions process may be
6 mechanical. I heard no evidence from folks involved in the
7 admissions process that it's mechanical. This formulaic
8 becoming mechanical makes no sense to me, but it certainly
9 makes no sense to hear it from a side that sponsored a model
10 that can change race.

11 Let's talk about the last mathematical example, which
12 concerns percentages, and I'll put percentages in quotes. We
13 learn that Professor Arcidiacono likes to measure things. He
14 usually likes to measure the influence of race alone, in a
15 small section where the numbers might be higher. And charts
16 were put before the Court on his direct referencing a number
17 for 91.1 percent of explaining something. And when I grew up,
18 91.1 percent meant about 91 out of 100. But as it turns out --
19 and our slides are pretty small -- Professor Hoxby went back
20 and said, "Wait a minute. If you're measuring the influence of
21 race on a decision, what about the other things?" And she goes
22 through and looks at what else affects the decision; and, lo
23 and behold, when you add up the percentages, it's 91 percent or
24 a couple of hundred percents, it all adds up to 543 percent
25 plus. That's not a percent. Percents are out of a hundred.

1 And more interestingly, Judge, besides being misleading
2 math, if you look at this chart, the 91.1 percent number he
3 gets is for share due to race/ethnicity under a column that's
4 looking at a subset of the applicants, just the African
5 American applicants. That's 91.1 percent. If you look across
6 the whole process at all the races, the column two to the right
7 is 21 percent. That 21 percent is on a scale of, if my eyes
8 tell me correctly, 539. I checked with my calculator
9 beforehand. If you divide 21 by 539, a little bit less than
10 4 percent.

11 So here he has a modeling that would show the effect of
12 race by his model, that we don't agree with, would be
13 4 percent. But he puts it on a scale of 500 and calls it
14 21 percent, then changes the question to how does this affect
15 one subgroup; and we've gone from 4 percent to 91 percent with
16 a couple of nifty moves. This is misleading math. This is not
17 math you'll find in a textbook when you get percentages that
18 are 500, 543. That doesn't work and that is not credible.

19 As to his model, even if one put aside some of the other
20 issues, one would note he's always trying to find a way to
21 measure in a small group and not across the process. I will
22 briefly talk about Professor Hoxby in comparison. We firmly
23 believe that Professor Hoxby is far more credible than
24 Professor Arcidiacono and Mr. Kahlenberg as an expert. I'll
25 come back later as to whether or not some of her testimony,

1 which was characterized as incoherent -- I will come back to
2 that at the end as a separate topic.

3 But just looking at how she dealt with race-neutral
4 alternatives, it was clear that Professor Hoxby went out of her
5 way to try to give every race-neutral alternative a shot. She
6 wasn't gaming for one side or the other. She said, If you had
7 a race-neutral alternative, what assumptions do we need to
8 make? And then she had made the assumptions that were
9 generous, that favored the other side. She wasn't trying to
10 predict an outcome. Her models don't say what's likely to
11 happen. Her models are measuring what would happen on the best
12 day for a race-neutral alternative.

13 And when she was pressed on cross-examination about her
14 role, I think she gave a very eloquent answer. She said, "I
15 think I still owe it to people to choose assumptions that are
16 not so favorable that we're starting to make things up. I
17 don't think that's my role as an expert. I think I need to be
18 responsible to the data and to the truth." And I think that
19 captures her.

20 I will briefly do one more digression into math because it
21 was raised this morning. We heard a lot of testimony yesterday
22 about the pseudo R-squared and what it means, and we had some
23 passing references to textbooks, and there was a challenge
24 again today as to whether or not she could properly use the
25 pseudo R-squared. It's a tempest in a teapot that I'll

1 explain.

2 First, they cited to a text that said something to the
3 effect that the pseudo R-squared has no logical connection to
4 the fit of the data. In other words, what does the pseudo
5 R-squared mean? It doesn't tell you how it fits. That's an
6 interesting approach to take since their own expert testified
7 differently. Professor Arcidiacono has a problem where he
8 disagrees and thinks the R-squared may not give full credit for
9 how much it fits the data, but there's a relationship between
10 pseudo R-squared and the fit.

11 Here's what he said in his testimony: "The pseudo
12 R-squared is trying to get a measure of fit for the model.
13 Pseudo R-squared is trying to find a counterpart to R-squared.
14 But what it really does is it just says if it's a higher
15 number, it fits the data better."

16 Let me tell you why it's a tempest in a teapot.
17 Professor Hoxby says that with the pseudo R-squared in her
18 model, she thinks it explains -- not predicts, explains about
19 50 percent of the decision. They both agree that her model
20 might predict 85 percent of the decision but explains
21 50 percent. Professor Arcidiacono thinks it's more. Putting
22 aside the fact that we fundamentally disagree with his model
23 and his assumptions and what else is baked in there, they can't
24 vary that much. If she says it predicts half, there's no way
25 in the world it predicts all. But let's just spot him there

1 for a hypothetical.

2 In the pie chart where she shows how much race explains --
3 race on the left is that small red bar, 1.2 percent, and on the
4 right, I believe it's 9.8 percent how much test scores show,
5 and that's a better model because it shows both race and test
6 scores. The red, green, and orange is what is explained,
7 according to Professor Hoxby. Professor Arcidiacono thinks
8 more is explained by those three colors, okay.

9 If we doubled it, if we gave it credit as if the model
10 didn't explain half but explained all, which would be totally
11 unrealistic, the red slice for race would go from 1.2 percent
12 to 2.4 percent. That's what that fight is about, 1 percent or
13 2 1/2 percent. In addition, SAT scores would go from
14 9.8 percent to 19 percent. There's no change in the
15 fundamental fact that race is a less important factor.

16 And that takes us back to the initial point. Both experts
17 agree that race is not the dominant factor across the
18 admissions process, and we can't lose sight of that.

19 I know counsel would prefer I not talk about school group
20 review, but I must. It's important. It was an allegation that
21 they made. I know the passive voice can sometimes be very
22 elegant, but the complaint said that there was a school group
23 review process and the director of admissions, Steve Farmer,
24 knew what the race of the applicants were, and the complaint
25 put forward the thought that school group review and other

1 areas like waitlists were being used to cheat. They brought
2 the claim. They libeled Steve Farmer six years ago this week.
3 It was filed November 17th, 2014. And he waited for his day in
4 court. They never asked him a question about it.

5 Now, there's a logic to this. If you're a cheater and you
6 want to cheat the rules, you want to put your thumb on a scale
7 improperly in the admissions process, that's the place to do
8 it. Yet one expert worked for more than a thousand hours, the
9 other expert I forget how many hundreds of hours, and evidently
10 neither of them checked. They just made the allegation.

11 Well, you don't need to be an economist from Duke or
12 Stanford or Harvard to figure that out. You just count up the
13 tentative decisions. How many black, white, Hispanic, Native
14 American applicants are there in the temporary decisions or the
15 tentative decisions? Then count up how they changed. You just
16 need a calculator. Well, Professor Hoxby did it, and school
17 group review turns out to be the dog that didn't bark, the sign
18 that cheating wasn't going on.

19 And there's some important information in this slide that I
20 would like to cover. If you look here, the first takeaway that
21 Professor Hoxby told us is that not a lot happened at school
22 group review, and that's clear. When the changes were made,
23 they were small. A lot of the blue bubbles showed no changes,
24 some went up and some went down. So that tells you something.
25 But look at the top bar, and in the top bar, you look at 2013

1 and 2014. When the applicants went into the school group
2 review process, 10.1 percent of the admits were black, and when
3 school group reviewed ended, that number didn't change.

4 Now, what's interesting about that is you can go to the
5 right. The next year, at the beginning of the process,
6 9.3 percent of the admits -- the tentative admits were black.
7 And here is a fact that came out in the trial record in a
8 disconnected fashion. The year before, 2013-'14, there were
9 less than 100 black males on campus in the freshman class at
10 UNC, less than 100 out of 4,000. Steve Farmer told you it was
11 very upsetting. Students were upset. He was upset. It was a
12 problem.

13 And yet the next year they went in that school group review
14 process, it was 9.3 percent black admits, lower than the year
15 before. And what happened at school group review process? The
16 red bar shows it. The numbers went down. Even when it was
17 most extreme, they didn't cheat. That tells you something.

18 And I'll also tell you that's very, very ironic that they
19 would say here, I guess -- "evidence not developed at trial"
20 was a phrase used this morning, as if the allegation didn't
21 happen but might be there, or not pressing a specific claim to
22 the school group review process. They called UNC and its
23 people cheaters, and it isn't true. They never backed down.

24 And even now they're starting to back into a different
25 theory. They allege racial balancing in the complaint. No

1 evidence. It never happened. Now we're starting to hear about
2 what happens when they train people, the calibration theory, so
3 now some other scheme that's not school group review, it's not
4 waitlist review, not balancing review. They even said today
5 that the admissions officers aren't trying. When are they
6 going to stop libeling officers you've met and you saw, who
7 work hard, and without proof just cast aspersions on their
8 character? And why do they have to do it? Because the
9 evidence is otherwise amazingly weak. There was no
10 manipulation of the school group review process. There was no
11 manipulation of the waitlist. There is no scheme to lie,
12 cheat, and fake.

13 Even when he was on the stand, they didn't ask him about
14 it. They confronted him with the fact that after he was
15 falsely accused of using race to manipulate, he took race off
16 the core reports. And he explained why. If you're falsely
17 accused of something, then you don't want to leave the
18 impression that you're using race in the core reports to do
19 that. And here was the question and answer:

20 "And you knew that your admissions process was going to be
21 subject to discovery, correct?

22 "Answer: Yes.

23 "And you wouldn't want anyone to get the wrong idea?

24 "Answer: That's correct."

25 Well, that's exactly right. He was tired of people getting

1 the wrong idea.

2 So, Your Honor, I will wrap up Count I this way: Race was
3 not the predominant factor in the admissions process. It was
4 not the defining feature of an application. You saw that
5 through the witnesses who testified. You saw how they
6 explained what they did and what they didn't do. You also know
7 that because both experts agreed on the answer to the ultimate
8 question that race is not the predominant factor across the
9 admissions process. And you saw that because Professor Hoxby
10 did what people are supposed to do and tried to measure -- not
11 predict but measure the influence of a factor. She did a
12 Shapley decomposition, and that bore out too and showed that
13 race was far less important than test scores and other things.

14 And finally, the school group review process proves it.
15 That's where they would have cheated if they wanted to, and
16 they didn't.

17 I will turn to Count II. Here as well the university has
18 met its burden. It has proved that there are no race-neutral
19 alternatives available to the university that would allow the
20 university to achieve about the same level of academic
21 preparedness and about the same level of diversity at a
22 workable and tolerable administrative expense. It's a bit of a
23 mouthful.

24 I will tell you, because we've never gotten close to what
25 would be workable being discussed at this trial, we haven't

1 talked about cost. We haven't talked about what tolerable
2 administrative expense would be. We'll address that in our
3 papers. We will make clear that when experts were asked to
4 measure to see if they could recreate the same numbers, that
5 wasn't a legal determination. They were asked to measure
6 something objective. There hasn't been anything close.
7 Imagine if you were to ask someone is someone about as tall as
8 six feet. You wouldn't ask an expert that. You would say, Go
9 measure them. And in this example, Dr. Hoxby was asked to
10 measure. What she would say is, "I gave them every edge I
11 could. I let them wear platform shoes. I let them stand on
12 their heels. I let them do whatever they wanted to do, and
13 they couldn't reach six feet tall."

14 So I will make three points. First, as a matter of
15 historical context, race-neutral alternatives had not worked at
16 other highly selective universities. And I'll do this quickly.
17 The one that's been most cited is California. California,
18 where race-conscious admissions ended in 1996, and we're now --
19 24 years later we may hear that the class of '20 may have
20 achieved success? If the hope for the prior experience in
21 other universities is that UNC can replicate California, god
22 help UNC. That's 20 years of failure -- 24 years of failure.
23 That doesn't work. And as Professor Bridget Long said, "I find
24 it difficult to take a leap that a policy that started 20 years
25 prior is responsible for the current, you know, makeup of the

1 student body, especially given all the changes that have gone
2 on in California. The past does not give us hope that there's
3 a current way to do it."

4 And that's after all the literature review by
5 Dr. Kretchmar, Dr. Panter, Steve Farmer within UNC, and all the
6 efforts of experts from both sides in this case. Race-neutral
7 alternatives have not worked at selective universities before.

8 Second point of context: No Court has found to date for a
9 selective university that a race-neutral alternative would
10 work. I opened with that point a week ago now on Monday, and
11 the next day the First Circuit affirmed that same decision by
12 Judge Burroughs in *Harvard* where she found that one would not
13 work there. And I agree different schools, different systems.
14 The fact that no other Court found one that worked is useful
15 context.

16 That leaves us the last hope for coming up with an
17 alternative that will work is in the simulation world, and I
18 submit when we go to the world of simulations and not the real
19 world, where no one has actually seen it happen, we need a
20 healthy dose of humility as to how much we can do with a
21 mathematical model that changes things. As a case in point, if
22 the whole discovery process had stopped after the first expert
23 report by Mr. Kahlenberg in this case, he would have had a
24 report that said his simulation was, quote, superior to the
25 status quo in virtually every respect after careful

1 investigation. And it wasn't true. The report went out in
2 good faith. Professor Hoxby spotted one mistake where they
3 missed filling 15 percent of the class. Then she spotted
4 another mistake where they had missed another 15 percent of the
5 class. The SAT numbers were very different. That plan was a
6 failure. We can't take chances on models unless people are
7 very careful. As Professor Long says, the details matter.

8 Now, the assumptions in modeling are what's critical. We
9 do bar graphs; they do bar graphs. But what's more important
10 than the bar graphs is what is built into those bar graphs, and
11 that's the flaw in the Kahlenberg simulations that we'll talk
12 about. I note that Professor Hoxby ran something like 109
13 different simulations of race-neutral alternatives. She did it
14 with assumptions favoring the race-neutral alternative, and it
15 didn't work. The fact that none of them worked -- and I'll
16 talk about the Kahlenberg simulations in a moment -- tells us a
17 lot.

18 A brief discussion of Mr. Kahlenberg. We don't have any
19 issues with his views, but we have serious issues with his
20 qualifications to do modeling in the space and offer that as a
21 serious alternative to what the facts are. This is a personal
22 cause for him, understood, but he edited the complaint; he
23 funded personally an amicus brief in the Supreme Court; and his
24 personal views for socioeconomic diversity are admirable,
25 shared by many, but they don't address the issues of the case,

1 whether or not racial diversity can be replicated in a manner
2 that is workable. For example, his efforts -- he did not know
3 when Professor Hoxby would point out errors in his model. He'd
4 have to ask Professor Arcidiacono whether that was correct, and
5 it was.

6 Now, before -- I'm going to -- in the interest of time,
7 Your Honor, I'm going to skip past a few things that
8 professor -- Mr. Kahlenberg indicated we should pursue as
9 race-neutral alternatives that we're already doing, so we'll
10 address it in our brief.

11 But we have -- UNC's engaged in extensive recruiting
12 efforts. UNC has engaged in increased financial aid. And I'll
13 talk briefly about that. If you look at the slide to the
14 right, one point that's really, really critical to appreciate
15 is that UNC is but one of only two public universities that
16 meet 100 percent -- Aaron, go back.

17 It's only one of two public universities in the country
18 that meet 100 percent of demonstrated need. There's the
19 Carolina Covenant program that allows people not only to have
20 their need met, but not even need to take out a loan. That
21 value has been recognized as the best value among public
22 universities for the last 17 years in a row. I won't dwell on
23 community college transfers or other programs.

24 Let me turn to one issue about wealth briefly.
25 Mr. Kahlenberg thinks that part of the solution to the problem

1 is to get more wealth information, and because one law school
2 has it and no college has it, that is workable. Yet the issue
3 that Steve Farmer immediately spotted was the fact that
4 actually filling out more forms hurts low-income students
5 because it discourages them from applying. That's the sort of
6 thing you learn when you're a person on the ground who knows
7 these things, rather someone who is well-intentioned who
8 doesn't know the details. And then you heard it from Professor
9 Bridget Long when she said, importantly -- and she's an expert
10 in FAFSA and financial information who has testified before
11 Congress: "This is a way we lose low-income students in terms
12 of going to college, because every form is a barrier."

13 So I will turn to the simulations, and I'll do them in
14 categories, and I'll move swiftly because I think the point can
15 be made succinctly. In those simulations, Mr. Kahlenberg is
16 trying to will a race-neutral alternative across the finish
17 line, but he does that without realistically accounting for how
18 applicant behavior will change. It's all in the assumptions.
19 So let me give you three different situations that his models
20 fall into.

21 In some he's worried that URM, underrepresented minority,
22 diversity may fall; it has to hold. And that's a real concern.
23 If you have an admissions program like UNC where you tell the
24 world, "We're committed to diversity in the classroom, in the
25 lab, on the field, in the dorm, everywhere, and we will be

1 race-conscious in admissions; we will consider everyone's
2 different strengths -- socioeconomic diversity, racial
3 diversity, geographic diversity -- and we are a welcoming
4 environment, not perfect, but an environment that is welcoming
5 and trying to get better," that is one message.

6 And then one day you tell the world, "Not so much anymore.
7 We're not interested in racial diversity. We'll not consider
8 it." An applicant might well look at that school differently.
9 They have in the past. That's what happened in Texas. An
10 applicant might be an underrepresented minority who says, "I
11 don't feel so welcome there." It might be a white male who
12 says, "I don't want to go to a school that's less committed to
13 diversity." And people don't apply and they don't apply and
14 next year there's less diversity. That can feed upon itself as
15 more and more people say, "This is not the place I want to go
16 to. I want to go somewhere else."

17 What does his model do to account for this? It just
18 assumes the problem away. When he has those issues, he just
19 assumes that the applicant pool never changes; every
20 underrepresented minority who applied before where race was
21 given consideration and can be a plus factor keeps on applying,
22 and if they get in, they actually come. It just assumes away
23 the problem and puts up a pretty graph that makes it sound like
24 underrepresented minority representation won't change because
25 the applicant pool doesn't change, and everyone who gets in

1 matriculates. He doesn't allow for choice.

2 The second problem he faces is when they're trying to
3 maintain top test scores. And I'll give you one example I
4 think we can explain cleanly with a slide. Many of his SES
5 boost programs give lower income people extra points in the
6 SAT. One of them was more than 400. Now, think about what
7 incentives that creates. Let's say you're a person who's low
8 income and you have an 1100 SAT score. You may be thinking, "I
9 can't get into UNC. My scores are too low and maybe I can't
10 afford to go there." And someone from the College advisory
11 Corps tells you one day, "Things are different. You're getting
12 an extra 400 or 420 points on your SAT score. Your 1100 is now
13 a 1520; and, by the way, we're need blind; and, by the way, if
14 you're lower income, you'll graduate without any debt." Wow.
15 That's attractive. Think of it as a 17- or 18-year-old kid,
16 think of their parents saying, "This is a new day." So they
17 apply, and with a 420-point bump, they'll get in.

18 This chart was trying to illustrate this. It's -- I hope
19 I'm clear, but the top line would be the regular process as it
20 is now, and all those green bars are different applicants with
21 different SAT scores, but they average out to a 1294. Then if
22 the SES boost plan is announced where people are told they get
23 400 points more credit, they will get new applicants. Those
24 are the blue bars. Someone who has a 952 on the SAT,
25 ordinarily not a very strong chance of getting in, but with 400

1 points or more, they're now a 1352 as far as the model goes.
2 Now you're getting those applicants that are blue bars that
3 have low SAT scores, but they get plused up for admissions
4 purposes.

5 Now when you run the averages across the admissions class,
6 the SAT scores go down considerably because now they don't
7 count the 400 points. That's not what they got on their SAT.
8 The 1100 is an 1100. That's a problem if you're trying to
9 replicate the same level of academic preparedness because
10 you're bringing in a whole host of people who have lower
11 scores.

12 What does the Kahlenberg simulations do? Assumes away the
13 problem. No one new is allowed to apply in those models. They
14 just assume that you announce an SES-boost, which opens the
15 doors to lower-income people to apply and get in and go and
16 graduate debt free, and nothing changes in applicant behavior.

17 Your Honor, that's how assumptions rig the system. If you
18 have to assume that the program fails to make it work, it's not
19 workable. They're betting on a model that appeals to
20 low-income students, but the only way the numbers can't fall,
21 they have to lock all those applicants out and then run their
22 regressions and come up with great answers.

23 Finally, there's a scenario where they do switch and allow
24 people to apply. Well, what's clear is they're not
25 pressure-testing their assumptions. They're not saying what's

1 the best case and what's the worst case. Every time they pick
2 an assumption, they cherry-pick the one that favors the model.
3 If I'm worried about too many minority applicants not applying
4 anymore, don't let them leave. They're stuck in an applicant
5 pool. If I'm worried for modeling purposes that low-income
6 students come flooding in with lower scores, lock them out.
7 That's how they do it. When they switch to the "let's open it
8 up to the broader universe," they need numbers. They need lots
9 of minority applicants to apply in the hope of maintaining
10 racial diversity, and they need lots of really smart test
11 takers to apply. Lots of 1600 kids would be great so you can
12 keep the average score up.

13 Well, there's a problem with that. The problem is it takes
14 two to tango. There's a university, and there's an applicant.
15 Applicants have choices, and applicants with high test scores
16 have lots of choices. They just assume in their model that
17 they get them all. Every valedictorian in the state of
18 North Carolina is assumed to apply, admitted, assumes to go --
19 to come to the University of North Carolina; no one stays
20 closer to home, no one goes to Duke, no one goes to MIT or
21 Stanford. All their models are based upon these fictions which
22 cannot hold true in the real world. Even with those
23 assumptions, they fall short of the actual numbers today, and
24 that tells you everything.

25 Your Honor, with regard to Count II, we have met the burden

1 of proof to show that there is no race-neutral alternative that
2 works. We looked at the history of what's happened in the rest
3 of the country. We've looked at Court opinions. We've looked
4 at the models -- the 108 models that Professor Hoxby ran, and
5 we've looked at the Kahlenberg simulations which only look good
6 when you make crazy assumptions.

7 Let me turn to one comment which was brought up, that
8 Professor Hoxby was fundamentally incoherent, because how could
9 she explain why race is so important in the admissions -- so
10 unimportant in the admissions process, and yet it's so hard to
11 replicate diversity. Well, I could ask the same question back:
12 If race is so dominant, how easily could you replace it? But I
13 don't need to. On a chart, if we had a decile, I think
14 Professor Hoxby has got four to five deciles above me in
15 coherence, but I'll try.

16 We can't mistake dominance for importance. The UNC
17 admissions process does not have race as a predominant factor.
18 It allows race to play a role in some decisions, some decisions
19 on the bubble. That's the point. Those decisions are not
20 dominant, but they're important. They make the difference
21 between whether you have a year with less than a hundred black
22 males enrolling in a freshman class or not. Not being dominant
23 doesn't mean it's not important, doesn't mean it's not
24 fundamental to the learning and engaging that goes on campus;
25 and on the other hand, every time you take out race

1 consciousness for admissions, the arrow points down on
2 diversity. It has to. You're sending a message to the world
3 that it no longer counts as much, we no longer care as much,
4 and every incentive then is for folks to leave the applicant
5 pool who may be minorities, and if there's another program in
6 place, it may bring in folks or not. So it's important even
7 though it's not dominant, and it's hard to replace.

8 The fact that we don't have a race-neutral alternative
9 available now doesn't mean people aren't trying for it. Life
10 would be a whole lot easier for all of us when the day comes
11 when no race-neutral alternative is needed or until then a
12 race-neutral alternative will work.

13 I will end my remarks where we began a week ago. This case
14 is about factors, not simulated facts. The case is about
15 facts, not math. It's about people, not dots. I know that
16 there was an argument made that, gee, if you only spend 10
17 minutes on an application, maybe it's mechanical.

18 You may recall, Your Honor, that there was an applicant
19 from Kenya who we talked about -- and if we just blow that up a
20 little bit so I'm not trying to strain my eyes here -- who
21 talked about coming over from Kenya and being stereotyped by
22 the kids he met in America who expected him to be a certain
23 way. He said, "To my peers, I'm supposed to fit in with the
24 displaced African stereotype, the first time I felt classified
25 and like an outlier on a graph."

1 **THE CLERK:** Two minutes.

2 **MR. FITZGERALD:** Those applicants that you've heard
3 from, they're unobservables in all these models. The
4 Intervenors, their stories from personal essays and life
5 stories, much of that is unobservable.

6 Steve Farmer is unobservable in these models, the role he
7 plays. The role the admissions officers play are unobservable
8 because they don't fit into dots and graphs. Steve Farmer and
9 those admissions officers were unobservables to you, Your
10 Honor, two weeks ago, but not anymore. You saw them for who
11 they are, what they do, and what they don't do. What they do
12 is they see applicants as real people. They don't have race
13 define the features of any applicant. What they don't do is
14 cheat or violate the Constitution.

15 We need those people. UNC needs those people. UNC needs
16 to have race-conscious admissions. This is not the time or the
17 place to throw out that system and replace that system with an
18 academic index and a barrel of hope. It's got to be right.
19 It's important. This is not the time, I submit, that the Court
20 should enjoin UNC from doing the right thing for the right
21 reasons in the right way.

22 Thank you.

23 **THE COURT:** Thank you.

24 Does anyone need a short break? I just want to make sure
25 my staff is okay before we proceed with the next discussion.

1 All right. Yes, ma'am.

2 **MS. TORRES:** Thank you. And Genevieve Bonadies Torres
3 for the Defendant Intervenors.

4 And I'll start as well by thanking the Court for navigating
5 us through this trial under difficult circumstances with both
6 generosity and expertise. So thank you.

7 Good afternoon. One moment. Can I check if the clicker
8 works?

9 **THE COURT:** Yes.

10 **MR HINOJOSA:** Is it on?

11 **MS. TORRES:** Thank you. I turned it on.

12 **THE COURT:** All right.

13 **MS. TORRES:** Context matters when reviewing race-based
14 governmental action under the Equal Protection Clause. Those
15 are the words of the Supreme Court in *Grutter*. Context is key,
16 and the Student-Intervenors' testimony and application files
17 evidence how UNC's particularized context makes UNC's
18 race-conscious policy not only lawful but vital for producing
19 profound educational benefits and transforming our broader
20 society. UNC's context is shaped by its campus climate.
21 Students express their interactions across diversity were
22 eye-opening and made them more empathetic. It's shaped by
23 UNC's sociohistorical legacy of racial exclusion. UNC has made
24 substantial strides toward racial inclusion, but its segregated
25 past permeates the campus today. In the words of Star, there's

1 racist wallpaper across campus that makes students of color
2 feel alienated. And, finally, its shaped by the experiences of
3 UNC's student body who apply, enroll, and graduate to lead
4 communities across North Carolina and the country, students
5 like Laura Ornelas, whose racial identity is central to who she
6 is and must be referenced, in her words, "to provide a full
7 picture of who I am."

8 While the Student-Intervenors and Defendants have offered
9 extensive evidence of the student experience, the Plaintiff has
10 been silent. They've offered no student testimony and no
11 analysis of the student experience. Instead, the Plaintiff
12 seeks to take the facts of this case out of context. They
13 decontextualize race in the admissions process, and they ignore
14 the campus context altogether. It's a strategy that fails
15 under our constitutional standards, just as it's failed in
16 cases involving Michigan Law School, UT-Austin, and most
17 recently Harvard University.

18 When UNC's particularized context is properly considered,
19 UNC more than carries its burden on the two remaining counts in
20 this case, which I will address in reverse order. First,
21 race-conscious admissions remains necessary. The evidence
22 shows that there are no viable alternatives to considering race
23 that can comparably reap the very benefits of diversity on
24 UNC's campus. UNC has laid out its well-defined goals in DX3,
25 its report on the educational benefits of diversity and

1 inclusion. These goals are consistent with the previously
2 approved goals in *Fisher*. As our Student-Intervenors and the
3 student surveys attest, UNC is making meaningful progress
4 toward these goals.

5 To take just a few examples, racial diversity is helping to
6 promote the robust exchange of ideas. Star Wingate-Bey shared
7 how she, as one of the few black women in the class, raised
8 critical points in a class discussion about voter ID laws. She
9 voiced how such restrictions disenfranchise and inflict harm on
10 the black community, a problem that was otherwise overlooked by
11 her predominantly white classmates.

12 It broadens and refines understanding. Hanna Watson
13 testified about how -- her close friendship with a white South
14 African woman, how her friend shared her perspective on
15 apartheid, and Hanna shared about what it means to be a black
16 women and all of its complexities. It was healing, and
17 together they formed a better understanding of how to create a
18 racially reconciled society.

19 This student testimony is consistent with the student
20 surveys that UNC has conducted over decades to evaluate its
21 progress. For example, the 2016 diversity survey, which is in
22 the record in this case, showed that 80 percent of students
23 agreed that "exposure to diversity has improved my ability to
24 understand people from racial or ethnic backgrounds different
25 from my own."

1 But while UNC has made substantial strides towards its
2 diversity goals, evidence suggests that more progress is
3 needed. Stephen Farmer and Dr. Jayakumar both evaluated UNC's
4 progress towards its diversity goals using qualitative and
5 quantitative measures. Both found that UNC has not yet fully
6 harnessed diversity's benefits based on ample evidence that
7 UNC's racial minority students express high levels of feeling
8 tokenized in class and uncomfortable participating.

9 The Supreme Court has endorsed precisely this type of
10 evaluative approach that UNC is pursuing. Most recently in
11 *Fisher*, the Supreme Court affirmed UT-Austin's race-conscious
12 admissions policy after considering both statistical and
13 anecdotal evidence that African American and Hispanic students
14 experience feelings of loneliness and isolation.

15 Indeed, Student-Intervenor testimony provides painstaking
16 proof that more progress is needed at UNC. First, black and
17 Latinx students remain woefully underrepresented in many
18 courses. This makes black and Latinx students feel like
19 spokespersons for their race. As Star explained, she was often
20 the fact checker for the black experience, which was exhausting
21 and a burden.

22 Such isolation also impedes cross-racial interaction.
23 Andrew Brennen explained that he felt like he could not
24 contribute to classroom discussions when he was one of the only
25 black students in the room and all of the eyes turned to him to

1 explain a racially charged topic.

2 Second, black and Latinx students continue to face
3 incidents of racial hostility on campus. Rimel Mwamba shared
4 about how classmates told her slaves were not welcome at
5 parties. Andrew was called racial slurs on numerous occasions.

6 Third, UNC's particularized history of racial exclusion
7 continues to have present-day effects that exacerbate racial
8 isolation felt by UNC's black and Latinx students. Hanna
9 Watson shared about feeling terrified and targeted when the
10 relics of that history brought white supremacists onto campus
11 as part of a rally.

12 UNC student surveys demonstrate that these are not isolated
13 incidents, but reflective of patterns across the student body.
14 For example, the 2016 diversity survey showed approximately
15 half of black students and a third of Latinx students agreed
16 with the statement "I feel pressured in the classroom to
17 represent the views of all people from my racial and ethnic
18 background," as compared to 4 percent of white students. The
19 survey also reflected such isolation suppresses meaningful
20 cross-racial interaction. Approximately 40 percent of black
21 students and a third of Latinx students agreed or strongly
22 agreed with the statement "I feel that I need to minimize
23 aspects of my racial or ethnic culture to fit in here,"
24 compared to just 7 percent of white students.

25 Survey data likewise showed that racial hostility remains

1 commonplace on UNC's campus. 91 percent of students reported
2 hearing insensitive and disparaging racial remarks made by
3 other students, and the majority of students of color have
4 personally experienced bias at UNC. Of those reporting bias,
5 70 percent of Latinx students, 95 percent of black students,
6 and 100 percent of American Indian students report they've
7 specifically experienced bias due to their race.

8 All of these challenges are eased by greater levels of
9 racial diversity across groups and within groups. As Rimel
10 explained, when faced with racial hostility, she found relief
11 and recovery by surrounding herself with other African American
12 students. It allowed her to grow more into herself and to find
13 pride in her black identity.

14 Students of color are also doing the work of moving the
15 campus toward a healthier, more inclusive culture. Cecilia and
16 Laura were both heavily engaged in recruiting more students of
17 color onto UNC's campus, and Andrew Brennen explained that
18 black women in particular are leading the efforts to dismantle
19 the relics of UNC's exclusionary past and move it towards a
20 racially inclusive future. By cultivating a depth of diversity
21 across and within racial groups, race-conscious admissions is
22 indispensable for reaping the transformational benefits flowing
23 to today's students. It's indispensable as well for tackling
24 the current campus climate challenges so that UNC may continue
25 progressing towards fully achieving its diversity goals.

1 The Plaintiff does not dispute that race-conscious
2 admissions currently plays an important role in cultivating
3 racial diversity on campus. While Dr. Arcidiacono's analysis
4 is flawed on many levels, his findings show the harms at stake.
5 He asserts that eliminating the consideration of race would
6 sharply reduce the number of black and Hispanic students by
7 3,580 students over six years. That represents roughly a
8 50 percent reduction in the black and Hispanic students on
9 campus, students who are already highly marginalized and
10 isolated on campus. All students would lose out from this
11 decline.

12 The Plaintiff's expert, Mr. Kahlenberg, tries to mitigate
13 these harms by saying UNC could achieve comparable benefits by
14 using so-called race-neutral alternatives, but his alternatives
15 do not make up for the losses. It is worth underscoring up
16 front that Mr. Kahlenberg agreed that the best and most
17 efficient method for promoting racial diversity is to consider
18 race in admissions. He also did not consult with any students
19 or provide any analysis of how students currently feel racially
20 isolated on campus.

21 Turning to Mr. Kahlenberg's model, the flaws are numerous
22 and extensive, as Defendants' counsel has just discussed.
23 Student-Intervenors further emphasize three critical
24 deficiencies.

25 First, the decline in underrepresented minority students

1 would likely be even greater than estimated because
2 Mr. Kahlenberg's models -- sorry -- do not account for the
3 real-world changes in applicant behavior. The evidence shows
4 that highly qualified students of color would be less likely to
5 apply and less likely to accept those offers. For example,
6 Laura Ornelas stated forthrightly that if UNC had not
7 considered race, it would signal to her that students of color
8 were not welcome, and she would have been less likely to apply.

9 As a second defect, Mr. Kahlenberg is flatly wrong to
10 suggest that socioeconomic status can serve as a proxy for
11 race. As Andrew testified, his race and socioeconomic status
12 are not interchangeable or alike in how he experiences the
13 world. When he's running through a nice neighbor, people
14 notice his skin color and assume he's an outsider, irrespective
15 of his relatively affluent status.

16 As a third defect, Mr. Kahlenberg's modeling threatens to
17 reduce the diversity within each racial group. His mechanical
18 admission of students based on singular metrics, such as class
19 rank and large socioeconomic boosts, threatens to flatten the
20 very backgrounds of black, Latinx, and Native American students
21 who are currently admitted through UNC's process. A drop in
22 interracial diversity reduces the benefits flowing to students.
23 As Cecilia Polanco shared, diversity within the Latinx
24 community taught her to deconstruct her own previously held
25 biases about her own people. It showed her Latinos were not a

1 monolith.

2 Taken together, these significant deficiencies indicate
3 Mr. Kahlenberg's proposed alternatives would lead to steep
4 declines in racial diversity across and within groups. The
5 all-but-certain decline in diversity would further limit UNC's
6 capacity to enroll diverse students since students of color
7 play a leading role in UNC's recruiting efforts. As you heard
8 from Cecilia Polanco, it was seeing other students that looked
9 like her at recruitment events that made her want to attend
10 UNC. Altogether it's clear from the factual record that racial
11 considerations remain necessary at UNC.

12 The remaining question is whether UNC's manner of
13 considering race is individualized. The substantial record
14 shows that it is. Admitted black, Latinx, and Native American
15 students are eminently qualified and thrive once admitted. UNC
16 considers all pertinent elements of diversity, and UNC does not
17 award predetermined points or insulate candidates from review.

18 The Plaintiff seeks to decontextualize UNC's highly
19 complex, individualized process by manipulating the data to
20 assert that race is the defining feature for admitting black
21 and Latinx students, but that claim is false. And Luis
22 Acosta's file exemplifies why. His file includes his career
23 interest in being a physician, his bilingual language
24 proficiency, his dad's career as an assembly worker, his wide
25 range of honors and AP classes, and nearly straight As, his

1 deep involvement in extracurriculars. And situated within this
2 rich contextual information, Luis voluntarily checked the box
3 for Hispanic and Latino and further identified as Mexican
4 American. He wrote one personal essay about his grandmother
5 who lacked effective medical care in Mexico who has driven him
6 to become a doctor, and a second essay on the problematic
7 stereotypical portrayals of minority men and the racial
8 prejudice he's encountered as a result. The essay discusses
9 his efforts to dispel these stereotypes through cross-racial
10 conversations.

11 Luis shared all of this with UNC, and UNC listened and saw
12 him for his complexity. The reader comments note his
13 socioeconomic circumstances noting his fee waiver status, his
14 being first generation, his lower test scores, which are
15 nevertheless countered by his bilingual language abilities,
16 varied extracurriculars with 300-plus volunteer hours, and
17 supportive recommendations. Amidst all these comments is a
18 note that he would add diversity. UNC did not reduce Luis to
19 only his grades and test scores, as done by Dr. Arcidiacono's
20 crude academic decile analysis. Doing so is highly misleading.
21 As Luis testified, his standardized test scores were not as
22 high because he lacked the financial resources to take test
23 prep courses that are shown to boost scores. UNC did not
24 reduce Luis to his class rank or solely his socioeconomic
25 status, as done by Mr. Kahlenberg's modeling, which captures an

1 incomplete picture of Luis's dynamic background. Rather, the
2 comments show how UNC is engaging in precisely the type of
3 highly sensitive, individualized review process that the
4 Supreme Court has repeatedly affirmed.

5 And Luis is not a singular example. All of the
6 Student-Intervenors testified to their strong academics, their
7 wide-ranging work in their communities, and their compelling
8 stories tied to their racial identity. And, in fact,
9 eliminating race-conscious admissions would significantly
10 undermine the highly individualized process that the Supreme
11 Court has repeatedly endorsed. All eight of the
12 Student-Intervenors who testified expressed their ethnicity
13 remains an important inextricable aspect of their identity,
14 perspective, and future contributions.

15 The Plaintiff doesn't say that these strengths should not
16 be valued, but their requested remedy would compel universities
17 to blind themselves to any reference to race, a remedy that has
18 been rejected for over 40 years.

19 In sum, Your Honor, the context matters. Our Constitution
20 does not require colleges to blind themselves to the meaningful
21 context of students' lived experiences. Indeed, constitutional
22 standards suggest otherwise. As *Grutter* explained, by virtue
23 of our nation's struggle with racial inequality, such minority
24 students are both likely to have experiences of particular
25 importance to an institution's mission and less likely to be

1 admitted in meaningful numbers on criteria that ignore those
2 experiences.

3 And just this past week the First Circuit acknowledged
4 students' experiences can justify the legality of
5 race-conscious policies. The Court -- the First Circuit noted
6 how many students wrote in their applications how racial
7 identities have shaped their precollege experiences from which
8 admissions officers may appropriately infer a student's
9 leadership ability or other personal strengths.

10 Student experiences provide critical context in this case
11 as well. Student-Intervenors, along with the UNC Defendants,
12 have developed a context-rich record which shows UNC's holistic
13 race-conscious admissions process cultivates the type of
14 citizen leaders who can support UNC, North Carolina, and the
15 country in the ongoing, yet still unfulfilled, efforts to
16 bridge racial divisions and lift up all of our increasingly
17 diverse communities.

18 Student-Intervenors trust that this Court's holistic review
19 of the evidence, much like the UNC admissions policy itself,
20 will account for their stories and affirm the lawfulness of
21 UNC's race-conscious admissions process.

22 Thank you.

23 **THE COURT:** Thank you.

24 All right. That concludes our trial. Let me say -- and I
25 think I have been very clear throughout -- I have been so

1 | pleasantly impacted by the way in which these teams have worked
2 | together to make this happen in this very difficult
3 | environment. I don't think we could have made it through this
4 | many days with this -- with the kind and quality of testimony
5 | that we have dealt with if we didn't have attorneys the caliber
6 | of each of you. It has been my pleasure to preside over this
7 | trial.

8 | I do wish I could step down and shake each one of your
9 | hands, but we'll leave that for another day. But I will say I
10 | think you have done an extraordinary job in very difficult
11 | circumstances, and the Court appreciates that.

12 | I would like to also thank my staff, who have been totally
13 | committed to this process and making it work, and I appreciate
14 | all of that support as well.

15 | The next thing will be the findings of fact that I
16 | understand you will file within 30 days of the final transcript
17 | being produced. I cannot make a -- an estimate of time that it
18 | will take for that to happen. I do know we have one of the
19 | best court reporters that's working with us at this time, and
20 | she will, based on her other commitments, work very hard to get
21 | this done. She knows this is a priority for me, and it's very
22 | important.

23 | Are there any other matters that we need to address before
24 | I adjourn court today?

25 | **MR. STRAWBRIDGE:** None from Plaintiff, Your Honor.

1 **MR. FITZGERALD:** None for Defendants, Your Honor.

2 **MS. TORRES:** None from Student-Intervenors.

3 **THE COURT:** Thank you very much.

4 And I will look forward to getting the final document
5 related to the trial, and I can't give you an estimate on when
6 I will get that to you. Of course we have many other cases
7 that we have to deal with, and we are dealing with them in this
8 very difficult circumstance. But it is a priority for me, and
9 I will get it back to you as soon as I possibly can.

10 All right. Thank you very much.

11 And court is adjourned.

12 (Proceedings concluded at 4:37 p.m.)

13
14
15 **C E R T I F I C A T E**

16 I, LORI RUSSELL, RMR, CRR, United States District Court
17 Reporter for the Middle District of North Carolina, DO HEREBY
CERTIFY:

18 That the foregoing is a true and correct transcript of the
19 proceedings had in the within-entitled action; that I reported
20 the same in stenotype to the best of my ability and thereafter
reduced same to typewriting through the use of Computer-Aided
Transcription.

21
22 

23 Lori Russell, RMR, CRR
24 Official Court Reporter

25 Date: 12/18/2020